UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA,

PLAINTIFF,

-VS-

DOCKET NO. 1:16-CV-03088-ELR

STATE OF GEORGIA,

DEFENDANT.

TRANSCRIPT OF MOTIONS PROCEEDINGS
BEFORE THE HONORABLE ELEANOR L. ROSS
UNITED STATES DISTRICT JUDGE
MAY 10, 2017

APPEARANCES:

ON BEHALF OF THE PLAINTIFF:

AILEEN BELL HUGHES, ATTORNEY AT LAW
BONNIE I. ROBIN-VERGEER, ATTORNEY AT LAW
TRAVIS WILLIAM ENGLAND, ESQ.

ON BEHALF OF THE DEFENDANT:

ALEXA R. ROSS, ATTORNEY AT LAW
JOSHUA B. BELINFANTE, ESQ.
KIMBERLY K. ANDERSON, ATTORNEY AT LAW

ELIZABETH G. COHN, RMR, CRR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
ATLANTA, GEORGIA

(ATLANTA, FULTON COUNTY, GEORGIA; MAY 10, 2017, AT 10:02 A.M. IN OPEN COURT.)

THE COURT: THANK YOU, SIR.

THANK YOU ALL. PLEASE BE SEATED. AND GOOD MORNING TO YOU.

OKAY. I NOW CALL THE CASE OF THE UNITED STATES OF AMERICA AS PLAINTIFF VERSUS THE STATE OF GEORGIA AS DEFENDANT. THIS IS CIVIL ACTION 13-CV-3088. AND WE ARE HERE ON DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO STAY PROCEEDINGS.

I SUSPECT THAT, BASED ON SOME DEVELOPMENTS THAT HAVE OCCURRED SINCE THIS MOTION WAS FILED, THE MOTION TO STAY WILL NO LONGER BE APPLICABLE. BUT WE'LL GET TO ALL OF THAT IN JUST A MOMENT.

IN THE MEANTIME, I'D ASK FOR PLAINTIFF'S COUNSEL TO GO AHEAD AND ANNOUNCE YOUR APPEARANCE FOR THE RECORD. PLEASE GO AHEAD AND IDENTIFY WHOMEVER WILL BE ACTING AS LEAD COUNSEL FOR PURPOSES OF TODAY'S HEARING, BUT THEN EVERY ATTORNEY ON BEHALF OF PLAINTIFF WHO WILL SPEAK ON THE RECORD TODAY SHOULD INTRODUCE HIM- OR HERSELF.

MS. HUGHES: GOOD MORNING, YOUR HONOR. AILEEN BELL HUGHES REPRESENTING THE UNITED STATES OF AMERICA.

AND HERE AT COUNSEL TABLE I HAVE MR. TRAVIS ENGLAND.

MR. ENGLAND: GOOD MORNING, YOUR HONOR.

THE COURT: GOOD MORNING, SIR.

MS. HUGHES: AND ROBIN --

MS. ROBIN-VERGEER: I'M ROBIN-VERGEER.

THE COURT: ALL RIGHT. AND, COUNSELOR, WOULD YOU SPELL YOUR LAST NAME FOR ME?

MS. ROBIN-VERGEER: R-O-B-I-N HYPHEN V-E-R-G-E-E-R.

THE COURT: ALL RIGHT. GOOD MORNING TO ALL OF YOU. THANK YOU SO MUCH.

AND ON BEHALF OF THE DEFENDANT, IF YOU WOULD DO THE SAME, STARTING WITH WHOMEVER WILL ASSUME THE ROLE OF LEAD COUNSEL FOR TODAY'S HEARING.

MS. ROSS: GOOD MORNING, YOUR HONOR. I'M ALEXA ROSS. AND WITH ME TODAY ARE OTHER ATTORNEYS WHO ARE GOING TO BE ARGUING AS WELL.

THE COURT: ALL RIGHT.

MR. BELINFANTE: GOOD MORNING, YOUR HONOR. JOSH BELINFANTE ON BEHALF OF THE STATE OF GEORGIA AS WELL.

THE COURT: GOOD MORNING.

MS. ANDERSON: AND I'M KIMBERLY ANDERSON ON BEHALF OF THE STATE OF GEORGIA.

THE COURT: GOOD MORNING TO ALL OF YOU. THANK YOU SO MUCH.

ALL RIGHT. AND WE HAVE ALREADY INDICATED BY ORDER THAT EACH SIDE WILL HAVE ABOUT AN HOUR AND 20 MINUTES FOR ORAL ARGUMENT.

DEFENSE, BECAUSE IT IS YOUR MOTION, YOU WILL, OF

COURSE, BEGIN AND END. SO YOU WILL NEED TO MONITOR YOUR OWN TIME TO ENSURE THAT YOU ALLOT ADEQUATE TIME FOR REBUTTAL.

IF YOU LOOK TO THE CLOCKS THAT ARE OVER HERE TO MY RIGHT, THE DEFENSE CLOCK WILL BE OVER TO THE LEFT AND THE PLAINTIFF'S CLOCK WILL BE TO THE RIGHT. SO WE WILL BEGIN THE CLOCKS RUNNING, HAVE THE CLOCKS RUNNING ONCE YOU BEGIN YOUR ORAL ARGUMENTS.

ARE THERE ANY ISSUES, WHETHER HOUSEKEEPING OR OTHER, TO TAKE UP BEFORE WE BEGIN? ON BEHALF OF THE PLAINTIFF?

MS. HUGHES: NO, YOUR HONOR. THANK YOU.

THE COURT: THANK YOU.

ON BEHALF OF DEFENDANT.

MS. ROSS: NO, YOUR HONOR. THANK YOU.

THE COURT: ALL RIGHT. WELL, DEFENSE, YOU MAY PROCEED. THANK YOU SO MUCH.

MS. ROSS: AGAIN, GOOD MORNING, YOUR HONOR. THANK YOU FOR HEARING ORAL ARGUMENT IN THIS IMPORTANT CASE.

I AM ALEXA ROSS, THE SPECIAL ASSISTANT ATTORNEY GENERAL NAMED TO REPRESENT THE STATE OF GEORGIA. AND MY PORTION OF THIS ARGUMENT IS GOING TO BE REGARDING PAGES TWO THROUGH EIGHT OF OUR BRIEF AND ARGUMENT C. BUT IN TERMS OF SUBJECT MATTER, I'M GOING TO BE TALKING ABOUT THE OVERARCHING ISSUES THAT ARE BEFORE THE COURT: FOR EXAMPLE, WHO AT THE STATE LEVEL IS IN CHARGE OF SPECIAL EDUCATION FOR STUDENTS, WHAT IS THE GNETS PROGRAM, HOW DO THE ADA AND THE I.D.E.A. COME

INTO PLAY HERE, IN WHAT SETTINGS ARE GNETS SERVICES PROVIDED.

I WILL ALSO TALK ABOUT THE SPECIFIC ALLEGATIONS IN THE COMPLAINT THAT COMPRISE THE TITLE II CLAIM AND WHY THOSE ALLEGATIONS ARE INSUFFICIENT TO STATE A CLAIM.

NOW, YOUR HONOR, WE ARE HERE ON A MOTION TO DISMISS. SO, OF COURSE, WE HAVE TO TAKE AS TRUE ALL OF THE WELL PLEADED FACTS IN THE COMPLAINT. AND THE STATE WILL DO EXACTLY THAT.

HOWEVER, THE SUBJECT MATTER OF THIS CASE IS SO IMPORTANT THAT TO NOT ACKNOWLEDGE IT SEEMS DISINGENUOUS. WHAT WE ARE TALKING ABOUT HERE IS EDUCATION AND THERAPEUTIC SERVICES FOR THE MOST SEVERELY EMOTIONALLY DISABLED STUDENTS IN GEORGIA FROM AGE THREE THROUGH AGE 21.

NOW, TO GIVE A PERSPECTIVE, IN GEORGIA, APPROXIMATELY 12 PERCENT OF THE PUBLIC SCHOOL POPULATION HAS SOME KIND OF DIAGNOSED DISABILITY. OF THAT 12 PERCENT, APPROXIMATELY TEN PERCENT REQUIRE SPECIAL EDUCATION AND RELATED SERVICES. SO THERE ARE SOME STUDENTS WITH DISABILITIES WHO DON'T NEED SPECIAL EDUCATION AND SOME WHO DO.

NOW, OF THOSE STUDENTS WHO REQUIRE SPECIAL ED AND RELATED SERVICES, THERE ARE MANY DISABILITY CATEGORIES. THERE'S DEAF-BLIND, THERE'S ATTENTION DEFICIT HYPERACTIVITY DISORDER, AND AUTISM, AND DOWN THE LINE. SOME STUDENTS HAVE A DIAGNOSIS OF WHAT IS CALLED EMOTIONAL BEHAVIORAL DISORDER. AND THAT IS A DISABILITY UNDER BOTH TITLE II OF ADA AND UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT. STUDENTS WHO HAVE

A DIAGNOSIS OF EMOTIONAL AND BEHAVIOR DISORDER ARE A SPECTRUM OF SEVERITY, AS YOU CAN IMAGINE, FROM MILD TO VERY SEVERE.

OF THAT GROUP OF STUDENTS, A SMALL PORTION ARE SEVERELY EMOTIONALLY BEHAVIORALLY DISORDER. NOW, THE STUDENTS WHO RECEIVE GNETS PROGRAM SERVICES -- GNETS IS THE GEORGIA NETWORK OF EDUCATIONAL AND THERAPEUTIC SUPPORT. THE STUDENTS WHO RECEIVE GNETS PROGRAM SERVICES ARE THOSE WHO EXHIBIT MANIFESTATIONS OF THE MOST SEVERE EMOTIONAL AND BEHAVIORAL DISORDER. SOME ARE TRAUMATIZED. SOME HAVE POST-TRAUMATIC STRESS DISORDER. SOME ARE NONVERBAL. SOME HAVE BEEN RAPED. SOME STUDENTS HAVE PARENTS WHO ARE SIBLINGS. WE HAVE A SPECTRUM OF STUDENTS HERE THAT ARE THE MOST SEVERELY DISABLED IN TERMS OF THEIR EMOTIONAL ABILITY.

NOW, AGAIN, THIS IS A MOTION TO DISMISS. AFTER I GO THROUGH SOME OF THE PARTICULARS REGARDING THESE STUDENTS AND HOW THEY ARE SERVED AND HOW THE STATE -- WHAT STATE ENTITY SERVES THEM AND THE LOCAL SCHOOL DISTRICTS, JOSH BELINFANTE WILL TAKE OVER AND DISCUSS THE MORE INTRICATE AND MECHANICAL ASPECTS OF THE MOTION TO DISMISS, WHY THE UNITED STATES DOES NOT HAVE STANDING, WHY THE UNITED STATES HAS FAILED TO STATE A VALID CLAIM, WHY THE STATE CANNOT PROVIDE THE RELIEF SOUGHT, WHY THE UNITED STATES IS SEEKING AN INVALID OBEY-THE-LAW INJUNCTION.

AND THEN, FINALLY, IF WE GET TO THE ISSUE OF STAY, KIMBERLY ANDERSON WILL ADDRESS THAT.

YOUR HONOR, SPECIAL EDUCATION LAW IS MORE THAN A LEGAL PRACTICE TO ME. IT IS MY LIFE'S WORK. I'VE SPENT 20 YEARS DOING IT. IT'S THE PRACTICE THAT I CHARGE HALF OF MY NORMAL HOURLY RATES FOR. AND I'M LUCKY ENOUGH TO BE WITH A LAW FIRM THAT ALLOWS THAT.

AND I ASK THE COURT TO NOTE THAT, IN THE COMPLAINT, THERE IS NO ALLEGATION THAT THE STUDENTS DO NOT RECEIVE SPECIAL EDUCATION AND RELATED SERVICES. THAT'S NOT THE ALLEGATION. THE THRUST OF THE UNITED STATES' ALLEGATION IS IN PARAGRAPH FOUR OF THE COMPLAINT, WHERE THE UNITED STATES SAYS THAT THE VAST MAJORITY OF STUDENTS SERVED IN THE GNETS PROGRAM COULD BE SERVED IN A GENERAL EDUCATION SETTING. THAT IS THE CRUX OF THE UNITED STATES' ARGUMENT.

NOW, WHAT THERE IS NO ALLEGATION OF IN THE COMPLAINT IS THAT ANY TREATMENT PROFESSIONAL IN CHARGE OF DETERMINING WHAT SERVICES A STUDENT RECEIVES AND THE SETTING IN WHICH HE OR SHE RECEIVES THEM HAS BEEN DETERMINED BY A PROFESSIONAL. THERE'S NO ALLEGATION OF THAT.

WHAT WE HAVE IS THE UNITED STATES' OPINION, BASED ON NOTHING ALLEGED, THAT THE VAST MAJORITY OF THESE STUDENTS COULD BE IN GENERAL ED. NO RECOMMENDATION OF ANY TREATMENT PROFESSIONAL IS ALLEGED. THAT IS KEY TO THE PROBLEM WITH THE COMPLAINT.

ALSO, THE DEPARTMENT OF JUSTICE DOES NOT ENFORCE THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT. AND THAT IS THE

STATUTE THAT MUST BE HONORED, IN ADDITION TO THE AMERICANS WITH DISABILITIES ACT, IN ORDER TO DETERMINE WHERE THESE STUDENTS ARE PLACED AND WHAT THEY RECEIVE.

SO, WE'VE PROVIDED THE COURT WITH NOTEBOOKS. INSTEAD OF GOING THROUGH OUR BRIEF ROTELY OR GOING THROUGH THE NOTEBOOKS ROTELY, I AM GOING TO TELL YOU WHAT'S IN THEM SO THAT WE CAN REFER TO THEM LATER. THESE NOTEBOOKS, THE NOTEBOOKS THAT WERE JUST HANDED OUT, GIVE THE COURT ALL OF THE LAW THAT I AM GOING TO BE REFERRING TO AND THAT MY COLLEAGUES WILL BE REFERRING TO.

TAB B HAS THE OLMSTEAD CASE, WHICH IS GOING TO FIGURE PROMINENTLY IN THE ARGUMENT FOR BOTH SIDES HERE.

TAB C ARE ALL OF THE FEDERAL REGULATIONS THAT GOVERN, ALL OF THE PERTINENT FEDERAL REGULATIONS THAT GOVERN THE PROVISION OF SPECIAL EDUCATION AND RELATED SERVICES.

TAB D ARE THE GEORGIA REGULATIONS THAT ARE PROMULGATED AND ENFORCED TO COMPLY WITH THE FEDERAL LAW.

AND TAKE A LOOK, PLEASE, YOUR HONOR, AT THE FEDERAL REGULATIONS, WHICH ARE UNDER TAB C. I'D LIKE TO CALL THE COURT'S ATTENTION TO C-5. FEDERAL LAW REQUIRES THE STATE EDUCATIONAL AGENCY -- NOT THE AMORPHOUS STATE -- BUT THE STATE EDUCATIONAL AGENCY, WHICH IS THE STATE DEPARTMENT OF ED, TO PROMULGATE RULES THAT REQUIRE THE LOCAL EDUCATION AGENCY, THE SCHOOL DISTRICTS, TO FOLLOW I.D.E.A.

AND UNDER TAB FIVE, WE SEE THE CODE OF FEDERAL

REGULATIONS, THE FEDERAL LAW, SAYING, AN LEA, WHICH IS THE SCHOOL DISTRICT, IS ELIGIBLE FOR ASSISTANCE UNDER PART B, MEANING FEDERAL FUNDING FOR SPECIAL ED, IF IT SUBMITS A PLAN THAT PROVIDES ASSURANCES TO THE STATE EDUCATIONAL AGENCY, THE STATE DEPARTMENT, THAT THE, THAT THE LOCAL DISTRICT MEETS ALL OF THE CONDITIONS OF I.D.E.A.

SO, IN TERMS OF WHERE THE RUBBER MEETS THE ROAD, HOW ALL THIS WORKS, WE HAVE THE FEDERAL LAW, THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT. AND IT SAYS, STATE EDUCATIONAL AGENCIES, STATE DEPARTMENT OF ED, YOU GET FEDERAL FUNDS TO SUPPORT THE EDUCATION OF SPECIAL EDUCATION STUDENTS, BUT YOU ONLY GET THESE FEDERAL FUNDS IF YOU ASSURE US THAT YOU ARE GOING TO UPHOLD THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT AND ITS PROVISIONS.

AND THE FEDERAL LAW RECOGNIZES THAT THAT'S ACTUALLY CARRIED OUT AT THE SCHOOL DISTRICT LEVEL. SO THE STATE HAS TO HAVE POLICIES IN PLACE UNDER WHICH THE SCHOOL DISTRICTS MUST, IN TURN, CARRY OUT THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT. THAT'S HOW IT WORKS.

SO WHAT ARE THE SPECIFICS. HERE ARE THE SPECIFICS. UNDER FEDERAL AND STATE LAW, FIRST, THERE IS SOMETHING CALLED CHILD FIND. SCHOOL DISTRICTS MUST IDENTIFY STUDENTS WHO SEEM TO HAVE SPECIAL NEEDS. HOW ARE THEY IDENTIFIED? SOMETIMES BY CLASSROOM TEACHERS, SOMETIMES PARENTS REFER, BUT BEGINNING AT AGE THREE, FOR PART B. THEN THOSE STUDENTS UNDERGO ASSESSMENT.

THEY UNDERGO PSYCHOEDUCATIONAL ASSESSMENT, HEARING TESTS, PHYSICAL TESTS, WHATEVER IT SEEMS TO BE NECESSARY GIVEN WHAT THE STUDENT IS MANIFESTING. IF THE RESULTS OF THE ASSESSMENT ARE SUCH THAT THE STUDENT APPEARS TO HAVE A DISABILITY, A TEAM IS ASSEMBLED. THAT TEAM IS CALLED AN IEP TEAM, INDIVIDUALIZED EDUCATION PLACEMENT TEAM.

THE MEMBERS OF THE IEP TEAM MUST INCLUDE PEOPLE KNOWLEDGEABLE REGARDING THE STUDENT AND REGARDING THE DISABILITY. YOU HAVE TO HAVE A REGULAR EDUCATION TEACHER. YOU HAVE TO HAVE A SCHOOL DISTRICT-LEVEL PERSON, WHO IS ABLE TO OKAY THE PROVISION OF CERTAIN SERVICES. MOST OF THE TIME, YOU HAVE A SCHOOL PSYCHOLOGIST.

THE REGULATIONS I'VE PROVIDED IN THIS NOTEBOOK LISTS EVERYBODY WHO HAS TO BE A PART OF THE IEP TEAM. PARENTS ARE PART OF THE IEP TEAM. AND, WHEN APPROPRIATE, THE STUDENTS ARE PART OF THE IEP TEAM.

IEP TEAM GETS TOGETHER ONCE A YEAR AND SAYS, OKAY, LET'S LOOK AT WHERE THIS STUDENT IS, WHAT IS THE STUDENT'S STATUS, HIS OR HER WEAKNESSES, HIS OR HER STRENGTHS, WHAT DOES THIS STUDENT NEED IN ORDER TO LEARN, IN ORDER TO BE ABLE TO BENEFIT FROM EDUCATION. AND THAT'S THE BIG DIFFERENCE BETWEEN AN ANTIDISCRIMINATION ACT LIKE ADA, WHICH SAYS YOU CANNOT DISCRIMINATE AGAINST ANYONE ON THE BASIS OF DISABILITY, AND I.D.E.A., INDIVIDUALS WITH DISABILITIES EDUCATION ACT.

IT'S AN AFFIRMATIVE ACTION STATUTE THAT SAYS, IF THAT

DISABILITY IS SUCH THAT THE STUDENT REQUIRES SPECIAL ED, YOU MUST PROVIDE -- NOT YOU CAN'T DISCRIMINATE -- BUT YOU MUST PROVIDE EVERYTHING THAT STUDENT NEEDS TO BE ABLE TO BENEFIT FROM HIS OR HER EDUCATION.

NOW, THE KINDS OF SERVICES THAT ARE PROVIDED TYPICALLY INCLUDE ASSISTIVE TECHNOLOGY PERHAPS, PHYSICAL THERAPY, OCCUPATIONAL THERAPY, EMOTIONAL COUNSELING, COGNITIVE BEHAVIORAL THERAPY, THERAPIES THAT MOST PARENTS COULD NOT POSSIBLY AFFORD FOR THEIR CHILDREN IF THEY WERE IN PRIVATE SCHOOL. SO WHAT THE PUBLIC SCHOOLS DO FOR STUDENTS WITH SPECIAL NEEDS IS REALLY REMARKABLE.

NOW, ONCE THE IEP TEAM DETERMINES WHAT SERVICES THE STUDENTS NEED, THE IEP TEAM THEN HAS TO GO TO PART TWO, WHICH IS REALLY THE CRUX OF THIS CASE. AND THAT IS, WHAT IS THE LEAST RESTRICTIVE ENVIRONMENT IN WHICH WE CAN DELIVER THOSE SERVICES.

BOTH FEDERAL AND STATE LAW REQUIRE -- AND IT'S IN THE NOTEBOOKS -- THAT THE IEP TEAM BEGIN WITH THE PRESUMPTION THAT THE STUDENT CAN BE SERVED IN THE GENERAL EDUCATION CLASSROOM. NOW, PERHAPS THE STUDENT WILL NEED SUPPORTS IN THAT CLASSROOM, AN AIDE, A SPECIAL TEACHER WHO COMES IN AND OUT. PERHAPS YOU WILL NEED TO BE PAIRED -- HE OR SHE NEEDS TO BE PAIRED WITH A SPECIALIST.

IF THAT CAN'T BE DONE, THE NEXT STEP, GENERALLY SPEAKING, IS WHAT'S CALLED A PULLOUT. A STUDENT CAN BE PULLED

OUT OF THE GENERAL ED CLASSROOM FOR PARTS OF THE DAY TO GET CERTAIN SERVICES THAT CAN'T BE DELIVERED IN THE REGULAR CLASSROOM.

IF THAT WON'T WORK, WELL, THEN, THE IEP TEAM DETERMINES WHETHER -- AND I'M SKIPPING SOME STEPS IN THE MIDDLE, BUT THIS IS THE GENERAL IDEA -- THE IEP TEAM THEN DETERMINES WHETHER A DAY SCHOOL IS APPROPRIATE, WHETHER THE STUDENT HAS TO BE REMOVED FROM A GENERAL ZONED SCHOOL AND GO TO A SETTING DURING THE REGULAR SCHOOL DAY AND THEN PERHAPS GO BACK TO SCHOOL FOR EXTRACURRICULAR ACTIVITIES, PERHAPS GO HOME.

THE MOST RESTRICTIVE PLACEMENT IS THE RESIDENTIAL PLACEMENT. THERE ARE SOME STUDENTS WHO ARE IN, NOT ONLY BEHAVIORALLY-DISORDERED STUDENTS, BUT FOR ANY DISABILITY -- WELL, MOST DISABILITIES SO SEVERE THAT THEY HAVE TO BE TAKEN OUT OF THEIR COMMUNITIES, AWAY FROM THEIR FAMILIES, AND LIVE IN RESIDENTIAL TREATMENT CENTERS WHERE THEY GET SOME EDUCATION, AND IT IS AN EDUCATION/HOSPITAL SETTING.

NOW, STATE OF GEORGIA WANTS TO PREVENT STUDENTS AS MUCH AS POSSIBLE FROM HAVING TO LEAVE THEIR COMMUNITIES AND THEIR FAMILIES. AND THIS IS WHERE GNETS COMES IN. THE GEORGIA NETWORK FOR EDUCATIONAL AND THERAPEUTIC SERVICES IS NOT REQUIRED BY FEDERAL LAW. GNETS IS THE CREATION OF THE GEORGIA LEGISLATURE AND THE STATE BOARD OF EDUCATION TO PROVIDE SERVICES TO STUDENTS TO PREVENT THEM FROM HAVING TO LEAVE THEIR FAMILIES AND THEIR COMMUNITIES AND GO INTO RESIDENTIAL

PLACEMENT.

WHAT IS GNETS. GNETS IS NOT A PLACE. GNETS IS A PROGRAM. AND IT'S NOT JUST ONE PROGRAM. WHAT GNETS IS IS A NETWORK OF PROVIDERS WHO SPECIALIZE IN STUDENTS WITH SEVERE EMOTIONAL AND BEHAVIORAL DISORDER SYMPTOMS. EACH STUDENT WHO RECEIVES GNETS PROGRAM SERVICES RECEIVES THOSE SERVICES BECAUSE HIS OR HER IEP TEAM HAVE DETERMINED THEY ARE NECESSARY IN ORDER FOR THAT STUDENT TO BENEFIT FROM HIS OR HER EDUCATION.

GNETS PROGRAM SERVICES CAN BE PROVIDED IN THE GENERAL EDUCATION SETTING, AND THEY OFTEN ARE. THAT WHOLE SPECTRUM OF SERVICES THAT I JUST MENTIONED APPLIES. SOME STUDENTS HAVE TO BE PULLED OUT OF THEIR CLASS FOR PART OF THE DAY TO HAVE GNETS PROGRAM SERVICES, PERHAPS COGNITIVE THERAPY, PERHAPS BEHAVIORAL THERAPY PROVIDED TO THEM.

A SMALL SUBSET OF GNETS PROGRAM STUDENTS ARE SERVED IN WHAT IS CALLED A SELF-CONTAINED ENVIRONMENT. AND IT'S THAT ENVIRONMENT THAT IS THE SUBJECT OF THE LAWSUIT HERE.

A SELF-CONTAINED ENVIRONMENT IS AN ENVIRONMENT WITH ONLY STUDENTS LIKE YOU WHO HAVE THESE SPECIAL NEEDS. THERE ARE TWO DIFFERENT PLACES WHERE GNETS PROGRAM SERVICES HAVE BEEN PROVIDED IN SELF-CONTAINED SETTINGS. ONE, THERE ARE FREE-STANDING GNETS FACILITIES. AND, TWO, SOME REGULAR ZONED SCHOOLS HAVE AREAS THAT ARE RESERVED FOR SELF-CONTAINED GNETS PROGRAMS.

NOW, IF I MAY, YOUR HONOR, I AM GOING TO SPEAK VERY

LOUDLY WHILE I GO OVER TO THIS POSTER.

THE COURT: CERTAINLY.

MS. ROSS: THIS IS THE STATE BOARD OF EDUCATION OF GEORGIA'S RULE AND REGULATION REGARDING GNETS. THE PURPOSE OF GNETS IS TO PREVENT CHILDREN FROM REQUIRING RESIDENTIAL OR OTHER MORE RESTRICTIVE PLACEMENTS BY OFFERING COST-EFFECTIVE COMPREHENSIVE SERVICES IN LOCAL AREAS. CHILD SPECIALISTS, INCLUDING EDUCATORS, PSYCHOLOGISTS, SOCIAL WORKERS, PSYCHIATRISTS, BEHAVIOR SUPPORT SPECIALISTS, ET CETERA, FROM A VARIETY OF PROFESSIONALS COLLABORATE ON BEHALF OF THE CHILDREN SERVED.

NOW, IN ADDITION, AN IEP TEAM -- REMEMBER, THEY HAVE TO START WITH THE GENERAL EDUCATION SETTING AS THEIR PRESUMPTION. AN IEP TEAM MAY CONSIDER GNETS PROGRAM SERVICES FOR A CHILD WITH AN EMOTIONAL AND BEHAVIORAL DISORDER BASED UPON DOCUMENTATION OF THE SEVERITY, THE DURATION, THE FREQUENCY, AND THE INTENSITY OF ONE OR MORE OF THE CHARACTERISTICS OF THE DISABILITY CATEGORY OF EMOTIONAL AND BEHAVIORAL DISORDERS.

AND THIS NEXT SENTENCE IS PERHAPS THE MOST IMPORTANT. THIS DOCUMENTATION MUST INCLUDE PRIOR EXTENSION OF LESS RESTRICTIVE SERVICES AND DATA WHICH INDICATE THAT SUCH SERVICES HAVE NOT ENABLED THE CHILD TO BENEFIT EDUCATIONALLY. EVERY STUDENT UNDER GEORGIA LAW AND REGULATION WHO IS SERVED IN A GNETS SELF-CONTAINED SETTING HAS ALREADY BEEN DETERMINED WITH

-- BY DATA, HARD DATA, TO BE UNABLE TO BENEFIT EDUCATIONALLY IN A LESS RESTRICTIVE ENVIRONMENT.

THE GNETS ENVIRONMENT IS INTENDED TO BE TEMPORARY. IT IS NOT INTENDED TO BE A PERMANENT SETTING FOR A STUDENT.

THE COURT: AND, EXCUSE ME, COUNSELOR, BUT BY DATA, DO YOU MEAN DATA THAT HAS GENERALLY BEEN COLLECTED, OR DO YOU MEAN SPECIFICALLY AS IT RELATES TO THAT PARTICULAR CHILD? FOR INSTANCE, THESE MEASURES HAVE BEEN ATTEMPTED WITH THAT CHILD AND FAILED, OR DATA THAT HAS BEEN COLLECTED WITH RESPECT TO OTHER CHILDREN SIMILARLY SITUATED?

MS. ROSS: THE LATTER, THE INDIVIDUAL CHILD, YOUR HONOR, YES.

WHEN THE IEP TEAM MEETS AT THE END OF ANY GIVEN SCHOOL YEAR, THE IEP TEAM HAS TO REVIEW THE DATA THAT'S BEEN COLLECTED THAT YEAR AND DETERMINE, HAS THE IEP WORKED. IF NOT, WE HAVE TO FIX IT. SO IT IS SPECIFIC TO THAT DATA.

THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT REQUIRES INDIVIDUALIZATION OF EACH AND EVERY IEP. NO SCHOOL SYSTEM CAN SAY, WE'RE GOING TO TAKE ALL OF OUR STUDENTS WITH EBD AND PUT THEM HERE, OR ALL OF OUR STUDENTS WITH PHYSICAL DISABILITIES AND PUT THEM HERE. ABSOLUTELY NOT.

AND I'M GLAD YOU ASKED THAT, YOUR HONOR, BECAUSE THE ALLEGATION IN THE COMPLAINT THAT THIS VAST MAJORITY OF STUDENTS WHO ARE NOW BEING SERVED IN THE GNETS PROGRAM IN SELF-CONTAINED SETTINGS CAN BE SERVED IN GENERAL EDUCATION, TO ADOPT THAT

WOULD REQUIRE THE STATE TO VIOLATE I.D.E.A., BECAUSE YOU MUST HAVE INDIVIDUAL DETERMINATIONS.

NOW, YOUR HONOR, THE UNITED STATES DOES NOT ALLEGE THAT THIS RULE OR THE GEORGIA STATUTE THAT PROVIDES THE AUTHORITY FOR THE RULE VIOLATES THE I.D.E.A. OR THE CONSTITUTION OR ADA. THEY DON'T POINT TO THE RULE OR TO THE STATUTE. THE COMPLAINT DOES NOT ALLEGE THAT THE STATE OF GEORGIA, THE AMORPHOUS STATE OF GEORGIA, FAILS TO FOLLOW THE RULE. IT DOESN'T ALLEGE THAT. THE COMPLAINT DOESN'T ALLEGE THAT THE SCHOOL DISTRICTS FAIL TO FOLLOW THE GNETS RULE.

NOW, HERE'S WHAT THE COMPLAINT ALLEGES. THE COMPLAINT ALLEGES THAT ADA TITLE II AS INTERPRETED BY THE UNITED STATES SUPREME COURT IN OLMSTEAD REQUIRES THAT THE VAST MAJORITY OF STUDENTS SERVED IN GNETS SELF-CONTAINED SETTINGS NEED TO BE MOVED TO GENERAL EDUCATION.

AND UNDER TAB B IN THE NOTEBOOK I'VE PROVIDED IS THE OLMSTEAD CASE. AND IT'S HIGHLIGHTED. AND ON PAGE 11 OF THE OLMSTEAD CASE -- UNFORTUNATELY, THIS IS HIGHLIGHTED IN GREEN AND IT'S A LITTLE DARK, BUT I CAN MAKE IT OUT FOR YOU. THIS IS THE COURT'S CONCLUSION: WE CONCLUDE THAT, UNDER TITLE II OF THE ADA, STATES ARE REQUIRED TO PROVIDE COMMUNITY-BASED TREATMENT FOR PERSONS WITH MENTAL DISABILITIES WHEN THE STATE'S TREATMENT PROFESSIONALS DETERMINE THAT EACH PLACEMENT, EACH PLACEMENT IS APPROPRIATE, THE AFFECTED PERSONS DO NOT OPPOSE SUCH TREATMENT, AND THE PLACEMENT CAN BE REASONABLY

ACCOMMODATED TAKING INTO ACCOUNT THE RESOURCES AVAILABLE TO THE STATE AND THE -- AND THE NEEDS OF OTHERS WITH MENTAL DISABILITIES.

NOW, OLMSTEAD DID NOT INVOLVE STUDENTS OR THE I.D.E.A. OLMSTEAD WAS ABOUT ADULTS WITH MENTAL DISABILITIES AND SPECIAL NEEDS. BUT EVEN IF WE FORGET ABOUT I.D.E.A., EVEN IF WE MAKE BELIEVE THAT I.D.E.A. DOESN'T GOVERN HERE -- AND IT DOES, CLEARLY -- IF WE LOOK ONLY AT TITLE II ADA, WHAT THE UNITED STATES SUPREME COURT SAYS MUST BE ALLEGED IS NOT ALLEGED IN THIS COMPLAINT.

THE COMPLAINT BEFORE THE COURT DOES NOT ALLEGE THAT THE STATE'S TREATMENT PROFESSIONALS HAVE DETERMINED THAT EACH INDIVIDUAL STUDENT CAN BE SERVED IN A LESS RESTRICTIVE SETTING.

NOW, YOUR HONOR, NO CASE SUPPORTS THE CLAIM THAT THE UNITED STATES HAS MADE TO THIS COURT. THERE IS NO CASE ON POINT. THIS LAWSUIT IS ONE OF A KIND. WHAT THE UNITED STATES IS ASKING THE COURT TO DO, FIRST, IS TO REQUIRE THE STATE -- WELL, THE STATE OF GEORGIA IS NOT A SUABLE ENTITY. AND IT'S AN AMORPHOUS BEING. THE STATE EDUCATIONAL AGENCY, THE STATE DEPARTMENT OF EDUCATION AGENCY AND THE LOCAL EDUCATION AGENCY, SCHOOL DISTRICTS, ARE IN CHARGE OF SPECIAL EDUCATION. AND THE LOCAL EDUCATION AGENCIES COMBINE TO RUN THE GNETS PROGRAMS.

SO THE WORD STATE JOSH BELINFANTE WILL ADDRESS MORE SPECIFICALLY. I WILL LEAVE ASIDE THOSE ISSUES, SAY THAT WHAT THE UNITED STATES IS ASKING HERE IS THAT THE UNITED STATES BE

ABLE TO COME IN AND DETERMINE GROUP-WISE WHO SHOULD BE SERVED IN GNETS SELF-CONTAINED SETTINGS AND WHO SHOULDN'T.

YOUR HONOR, I WANT TO BE COMPLETELY HONEST HERE. IS EVERY SINGLE STUDENT WHO'S SERVED IN THE GNETS SELF-CONTAINED SETTING CORRECTLY THERE? OF COURSE NOT. OF COURSE THERE ARE STUDENTS WHO NEED TO BE MOVED OUT, AND THEY ARE BEING MOVED OUT. BUT THAT'S AN INDIVIDUAL IEP TEAM DETERMINATION, AS IT MUST BE UNDER FEDERAL LAW. A THIRD PARTY CAN'T JUST COME IN AND SAY, THIS GROUP GOES OUT. THAT'S JUST -- THAT WOULD REQUIRE A VIOLATION OF I.D.E.A.

NOW, THE UNITED STATES ALSO ALLEGES THAT FACILITIES THAT HOUSE SOME OF THESE SELF-CONTAINED GNETS PROGRAMS ARE INADEQUATE. WELL, WHEN THE STATE LEARNS ABOUT THAT, THE STATE MAKES SURE THAT THOSE STUDENTS ARE MOVED ELSEWHERE TO BE SERVED. THEY ARE NOT TAKEN OUT OF GNETS. THEY ARE NOT DENIED GNETS PROGRAM SERVICES, BUT BE PUT IN BETTER FACILITIES.

REMEMBER, IT IS THE LOCAL EDUCATION AGENCIES THAT DETERMINE WHERE THE SERVICES ARE GIVEN. IF THE STATE FINDS OUT THAT A FACILITY IS INADEQUATE, THE STUDENTS AREN'T SERVED THERE ANYMORE.

SO I'M GOING TO TURN OVER TO JOSH NOW. BUT, IN PARTING, I DO WANT TO THANK YOU AGAIN FOR YOUR TIME. AND I'D ASK THE COURT TO CONSIDER HOW SPECIFIC I.D.E.A. IS REGARDING WHAT THE STATE AND THE LOCAL EDUCATIONAL AGENCIES MUST DO AND THE FACT THAT MAKING A WHOLESALE RECOMMENDATION, AS THE UNITED

STATES IS ASKING, WOULD REQUIRE A VIOLATION OF THAT LAW.

THANK YOU.

THE COURT: THANK YOU. LET ME ASK YOU ONE MORE QUESTION --

MS. ROSS: SURE.

THE COURT: -- BEFORE YOU STEP AWAY. WHEN YOU SAY, AS YOU JUST SAID AT THE END OF YOUR PRESENTATION, THAT WHEN THE STATE LEARNS ABOUT CERTAIN ISSUES, THE STATE DOES THIS OR STATE DOES THAT, SPECIFICALLY WHO ARE YOU REFERENCING?

MS. ROSS: THE STATE BOARD OF EDUCATION, YOUR HONOR.

THE COURT: THANK YOU. ALL RIGHT.

ALL RIGHT. THANK YOU.

MR. BELINFANTE: GOOD MORNING, YOUR HONOR.

THE COURT: GOOD MORNING AGAIN.

MR. BELINFANTE: TODAY, AS MS. ROSS INDICATED, I'M GOING TO ARGUE THE FIRST TWO SECTIONS OF OUR BRIEF AND, IN DOING SO, WILL ADDRESS THE COURT'S MORE RECENT ORDER ON THE QUESTIONS OF PROPER PARTY AND REDRESSABILITY OR WHETHER RELIEF IS AVAILABLE.

THE COURT: YES, SIR.

MR. BELINFANTE: THE FIRST ARGUMENT I'LL RAISE IS THE FIRST ONE IN OUR BRIEF, WHICH IS THAT THE UNITED STATES SIMPLY LACKS STANDING UNDER TITLE II TO BRING AN ACTION AGAINST THE STATE OF GEORGIA. THE DUDEK COURT, AS THIS COURT KNOWS WE RELY ON EXTENSIVELY, CONDUCTED A THOROUGH ANALYSIS OF THIS AND AN

ANALYSIS, FRANKLY, THAT WAS NOT DISCUSSED IN THE SUPPLEMENTAL AUTHORITY, THE HARRIS COUNTY DECISION BROUGHT TO THE COURT'S ATTENTION BY THE UNITED STATES.

IT IS APPARENT AND IT IS OBVIOUS THAT STANDING MUST BE DEMONSTRATED. IT IS NOT PRESUMED. AND WHEN DEALING WITH FEDERAL AGENCIES, AS THE SUPREME COURT SAID IN LOUISIANA PUBLIC SERVICE COMMISSION AGAINST THE FEDERAL COMMUNICATION COMMISSION IN 1986, AN AGENCY LITERALLY HAS NO POWER TO ACT UNLESS AND UNTIL CONGRESS CONFERS POWER ON IT.

AND THAT'S THE QUESTION BEFORE YOU TODAY. HAS CONGRESS AUTHORIZED THE UNITED STATES ACTING THROUGH THE ATTORNEY GENERAL TO BRING A TITLE II CLAIM. AND THE ANSWER TO THE QUESTION IS NO. AND AS COURTS HAVE ROUTINELY HELD, IN DETERMINING QUESTIONS OF STATUTORY INTERPRETATION, YOU BEGIN WITH THE TEXT OF THE STATUTE AT ISSUE.

IN YOUR NOTEBOOK AT TAB FIVE IS 42 -- OR, EXCUSE ME, TAB F.

THE COURT: TAB WHAT?

MR. BELINFANTE: F.

THE COURT: F?

MR. BELINFANTE: F AS IN FRANK. AND I'M GOING TO GO PUT IT UP HERE IN A SECOND. IT IS 42 U.S.C. 12133. THAT'S THE ENFORCEMENT SECTION OF TITLE II.

THIS IS THE STATUTORY TEXT WHICH THE UNITED STATES HAS BROUGHT THIS CLAIM. THE PROBLEM THE UNITED STATES RUNS

INTO AND THE FACT THAT THEY EFFECTIVELY CONCEDE ON PAGE EIGHT OF THEIR BRIEF, THEY SAY, WE ARE NOT ARGUING THAT THE UNITED STATES IS A PERSON. THEIR ARGUMENT, WHICH I'LL GET TO, IS, THEY'RE COVERED IN THE REMEDIES SECTION.

BUT LIKE ANY STATUTE PROVIDING FOR REMEDIES OR ENFORCEMENT, THERE'S A QUESTION OF WHAT, WHAT ARE THE REMEDIES. AND THAT'S THIS SECTION THAT THE UNITED STATES RELIES ON.

AND THERE'S A QUESTION OF WHO. WHO CAN BRING THE REMEDIES. AND THAT FOCUSES ON THE QUESTION OF WHO IS A PERSON. AND THE INQUIRY INTO THIS LAWSUIT CAN EFFECTIVELY END THERE AND EFFECTIVELY END BECAUSE, AS THE UNITED STATES INDICATES, IT DOES NOT ARGUE IT'S A PERSON. AND, FOR THAT MATTER, NEITHER DOES THE UNITED STATES CODE. AT 1 U.S.C. 1, THERE IS A DEFINITION OF THE WORD PERSON. AND IT SAYS, IT INCLUDES CORPORATIONS, COMPANIES, ASSOCIATIONS, FIRMS, PARTNERSHIPS, SOCIETIES, JOINT STOCK COMPANIES, AND INDIVIDUALS. NOTICEABLY ABSENT FROM 1 U.S.C. 1 IS ANY REFERENCE TO THE GOVERNMENT.

NOW, THE DUDEK COURT RELIES HEAVILY ON THE DECISION FROM THE UNITED STATES SUPREME COURT OF VERMONT AGENCY NATURAL RESOURCES AGAINST UNITED STATES FROM 2000. AND THE ISSUE IN THAT CASE IS WHETHER A STATE WAS A PERSON UNDER THE FALSE CLAIMS ACT AND COULD BE LIABLE TO THE FEDERAL GOVERNMENT FOR SUBMITTING FALSE CLAIMS. THE COURT DECIDED NO. AND THE MAJORITY OF THE COURT CONCLUDED THAT IT IS A LONGSTANDING INTERPRETIVE PRESUMPTION THAT PERSON DOES NOT INCLUDE THE

SOVEREIGN -- IN THAT CASE, THE STATE OF VERMONT -- BUT, INTERESTINGLY ITSELF, IT CITED AND RELIED ON THE DECISION THE UNITED STATES AGAINST COOPER FROM THE SUPREME COURT IN 1941. AND COOPER IS THE ONE THAT ADDRESSES THE UNITED STATES SPECIFICALLY.

AND THE COOPER COURT SAYS THAT IF THE PURPOSE WAS TO INCLUDE THE UNITED STATES, THE ORDINARY DIGNITIES OF SPEECH WOULD HAVE LED IT TO MENTION IT BY NAME. AND CONGRESS DID THAT, AS WE WILL DISCUSS IN A MINUTE, IN TITLE I AND TITLE III OF THE ADA, BUT NOT IN TITLE II.

EVEN THE DISSENT, JUSTICE STEVENS JOINED BY JUSTICE SOUTER IN VERMONT AGENCY IN DISCUSSING THE SHERMAN ACT AS ANOTHER EXAMPLE UNDER -- ADDRESSED THE ISSUE OF WHETHER THE SOVEREIGN, WHICH IS PROMULGATING THE LAW, ENACTING THE LAW, INCLUDES ITSELF. AND HE WROTE, FOR EXAMPLE, THE WORD PERSON IN THE SHERMAN ACT DOES NOT INCLUDE THE SOVEREIGN THAT ENACTED THE STATUTE, BUT IT DOES INCLUDE THE STATE.

I HAVE NOT SEEN ANY AUTHORITY THAT WOULD SUPPORT THE IDEA THAT THE UNITED STATES QUALIFIES AS A PERSON UNDER THIS STATUTE. THE CASES THAT HAVE BEEN CITED IN THE HARRIS COUNTY COURT TEND TO JUST MOVE PAST THE ISSUE, OR THEY RELY ON THE REHABILITATION ACT, WHICH JUDGE ZLOCH IN THE SOUTHERN DISTRICT OF FLORIDA ADDRESSED SQUARELY IN DUDEK.

LASTLY, YOUR HONOR, ON THIS POINT, THE QUESTION REALLY -- IF THE COURT IS SATISFIED THAT A PERSON DOES NOT

INCLUDE THE UNITED STATES, THE CLAIM CAN SIMPLY NOT BE BROUGHT. AND WHAT COOPER CORPORATION HELD IN TERMS OF IF CONGRESS WANTED TO INCLUDE THE UNITED STATES, IT WOULD HAVE SAID SO, AS I INDICATED, THAT'S MADE PLAIN BY TITLES 1 AND TITLE III.

THIS ONE'S A LITTLE SMALLER. BUT IT SHOWS YOU ON A COMPARATIVE BASIS -- AND WE'VE GOT HANDOUTS OF SLIDES, JUDGE, IF YOU WOULD PREFER THAT.

THE COURT: MS. ANDERSON HAS TAKEN CARE OF IT.

MR. BELINFANTE: OH, GREAT. PERFECT.

AND JUDGE ZLOCH POINTS THIS OUT, IN TITLE I AND TITLE III, YOU HAVE BOTH THE WORD PERSON AND THE WORD ATTORNEY GENERAL. TITLE II IS THE ONLY ONE THAT DOESN'T.

AND IN TITLE III, THIS IS -- WHAT YOU HAVE BEFORE YOU HERE IS BOTH A AND B. THEY ARE SEPARATE CODE SECTIONS ALTOGETHER. THEY ARE NOT JOINED. AND AS THE DUDEK COURT POINTS OUT, THERE ARE THREE CANONS OF STATUTORY CONSTRUCTION THAT WOULD SHOW THAT THIS WAS THE INTENT OF CONGRESS TO LIMIT TITLE II REMEDIES TO A PERSON AS DEFINED BY THE THE U.S. CODE AND AS INTERPRETED BY THE UNITED STATES SUPREME COURT.

THE FIRST IS THE SURPLUSAGE CANON, THAT IF THE UNITED STATES IS CORRECT THAT IT HAS JURISDICTION UNDER TITLE II BECAUSE IT IS INCLUDED WITHIN A PERSON, THEN THERE WAS NO POINT FOR CONGRESS TO INCLUDE THE ATTORNEY GENERAL AND PERSON IN TITLES I AND III. THE WORD ATTORNEY -- THE PHRASE ATTORNEY GENERAL WOULD BE DUPLICATIVE BECAUSE IT WOULD ALREADY BE

INCORPORATED IN WHO IS A PERSON.

REMEMBER, IT COMES BACK TO THE QUESTION REMEDIES ALWAYS BRING UP OF WHAT IS THE REMEDY AND WHO CAN BRING IT.

THE SECOND IS THAT STATUTES ARE PRESUMED TO HAVE -- OR WORDS AND STATUTES ARE PRESUMED TO HAVE THE SAME MEANING THROUGHOUT THE ACT. JUDGE DUDEK CITES THE GUSTAFSON AGAINST ALLOYD COMPANY, INCORPORATED DECISION FROM THE SUPREME COURT IN 1995 ON THIS POINT. THAT CASE ADDRESSED THE QUESTION OF WHETHER THE WORD PROSPECTUS IN THE 1933 SECURITIES ACT MEANT THE SAME IN SECTION TEN OF THE ACT AS IT DID IN SECTION 12. AND THE COURT RULED IN THE AFFIRMATIVE THAT IT DOES, BECAUSE AS THE COURT SAID, THE NORMAL RULE OF STATUTORY CONSTRUCTION IS THAT IDENTICAL WORDS USED IN DIFFERENT PARTS OF THE SAME ACT ARE INTENDED TO HAVE THE SAME MEANING.

AND SO IF YOU LOOK HERE AT THE WAY THAT CONGRESS SET UP TITLE I AND TITLE III, PERSON AND ATTORNEY GENERAL ARE PLAINLY TWO DIFFERENT ENTITIES. AND SO IF PERSON IS A DIFFERENT ENTITY THAN THE ATTORNEY GENERAL, THEN IN TITLE II, THE ATTORNEY GENERAL'S ABSENCE IS DISPOSITIVE.

LASTLY, THE DUDEK COURT ON PAGE FOUR CITED THE NEGATIVE IMPLICATION CANON OR EXPRESS VIEW OF MEANINGS. AND THERE BECAUSE CONGRESS NAMED ONLY PERSON IN TITLE II, THAT IS MEANT TO BE EXCLUSIVE. AND THAT WAS HELD SPECIFICALLY BY THE SUPREME COURT IN ANDERSON AGAINST SANDOVAL IN 2001 ADDRESSING THIS EXACT QUESTION OF ENFORCEMENT WHERE IT SAID, THE EXPRESS

PROVISION OF ONE METHOD OF ENFORCING A SUBSTANTIVE RULE SUGGESTS THAT CONGRESS INTENDED IT TO PRECLUDE OTHERS.

NOW, IN THE LIGHT OF THIS AUTHORITY, THE UNITED STATES AGAIN FOCUSES ON THE REMEDIES THAT ARE AVAILABLE, BUT IT FAILS TO ADDRESS WHO CAN BRING THOSE REMEDIES, AS THE HARRIS COUNTY COURT DID AS WELL. AND IT SIMPLY FAILS SIMPLE GRAMMAR, BECAUSE THE RIGHTS AND REMEDIES THAT ARE AVAILABLE, THEY ARE PROVIDED TO ANY PERSON. AND IF THE UNITED STATES IS NOT THAT PERSON, IT IS NOT PROVIDED THE SAME RIGHTS AND REMEDIES THAT ARE CITED IN THE PRECURSOR OF THE STATUTE.

AND THE SUPREME COURT IN A CASE CITED FOR A DIFFERENT REASON BY JUDGE ZLOCH, INTERNATIONAL PRIMATE PROTECTION LEAGUE VERSUS ADMINISTRATORS OF TULANE EDUCATION FUND IN 1991, HELD THE UNREMARKABLE AND WELL-SETTLED PRINCIPLE THAT YOU HAVE TO READ STATUTES GRAMMATICALLY. AND WHEN DONE SO HERE, THE UNITED STATES IS SIMPLY EXCLUDED FROM A PARTY THAT CAN BRING A TITLE II CLAIM.

BUT IT ALSO MAKES SENSE BEYOND GRAMMAR, BECAUSE THE REMEDIES, PROCEDURES, AND RIGHTS SET FORTH IN THE REHABILITATION ACT AND, THEREFORE, INCORPORATING THE CIVIL RIGHTS ACT, INCLUDE PRIVATE RIGHTS OF ACTION. SO WHAT CONGRESS WAS SIMPLY SAYING IS THAT A PERSON CAN BRING THE SAME TYPE OF PRIVATE RIGHT OF ACTION THEY COULD UNDER THE REHABILITATION ACT AND, THEREFORE, THE CIVIL RIGHTS ACT. THEY ARE NOT SAYING THE UNITED STATES COULD. THEY KNEW HOW TO DO THAT. THIS IS

SOMETHING SEPARATE.

SO THEN THE UNITED STATES RELIES ON OTHER COURTS, HARRIS COUNTY BEING THE MOST RECENT. AND AS WE POINTED OUT IN OUR SUPPLEMENTAL AUTHORITY FILED ON MONDAY, HARRIS CITES BASICALLY EIGHT CASES. ONLY TWO ADDRESS THE ISSUE OF STANDING. THE REST IT WAS NOT AN ISSUE.

AND THE ANALYSIS IN THOSE CASES, THE LATEST BEING HARRIS, WAS COVERED BY WHAT WE JUST DISCUSSED AND COVERED BY JUDGE ZLOCH IN THE DUDEK CASE.

SO THE UNITED STATES THEN CITES TO WHAT IT REFERS TO AS THE LEGISLATIVE HISTORY IN THE BRIEF AT PAGE NINE. THE PROBLEM THE UNITED STATES RUNS INTO IN LEGISLATIVE HISTORY IS THAT, AT BEST IN THIS CASE, YOUR HONOR, IT'S A MIXED BAG. AND THE PROBLEMS OF THAT WERE POINTED OUT BY JUSTICE KENNEDY IN THE DECISION OF EXXON MOBIL CORPORATION AGAINST ALLAPATTAH SERVICES, INCORPORATED, AT 545 UNITED STATES 546 IN 2005.

AND THERE JUSTICE KENNEDY ADDRESSED THIS ISSUE OF COMMITTEE REPORTS. THE UNITED STATES RELIES ON A COMMITTEE REPORT FROM THE LABOR COMMITTEE IN THE UNITED STATES HOUSE. JUSTICE KENNEDY SAID, RELIANCE ON LEGISLATIVE MATERIALS LIKE COMMITTEE REPORTS WHICH ARE THEMSELVES NOT SUBJECT TO THE REQUIREMENTS OF ARTICLE ONE MAY GIVE UNREPRESENTATIVE COMMITTEE MEMBERS OR, WORSE YET, UNELECTED STAFFERS AND LOBBYISTS BOTH THE POWER AND THE INCENTIVE TO ATTEMPT STRATEGIC MANIPULATIONS OF LEGISLATIVE HISTORY TO SECURE RESULTS THEY WERE UNABLE TO

ACHIEVE THROUGH STATUTORY TEXT. AS DESCRIBED PERHAPS MORE COLORFULLY BY OTHER COURTS, RELYING ON LEGISLATIVE HISTORY IS LIKE GOING TO A COCKTAIL PARTY AND SEARCHING OUT YOUR FRIENDS.

AND THAT'S ABSOLUTELY THE CASE HERE. IF THE COURT LOOKS AT HOUSE REPORT 101-485, ROMAN NUMERAL III, THAT'S THE JUDICIARY COMMITTEE'S REPORT. AND THE SECTION ON ENFORCEMENT OF TITLE II, THE UNITED STATES AND THE ATTORNEY GENERAL ARE NOT NAMED. THE ENERGY AND COMMERCE AND THE PUBLIC WORKS AND TRANSPORTATION COMMITTEES TAKE IT A STEP FURTHER AT BOTH HOUSE REPORT 101-485(4) -- THAT'S ENERGY AND COMMERCE -- AND (1). THAT'S PUBLIC WORKS AND TRANSPORTATION.

ON PAGE 39 OF THE ENERGY AND COMMERCE REPORT, THE COMMITTEE SAYS, IN DISCUSSING THIS SECTION OF THE ENFORCEMENT OF TITLE II, THE COMMITTEE SAYS, THIS SECTION PROVIDES THE REMEDIES, PROCEDURES, AND RIGHTS SET FORTH IN SECTION 505 OF THE REHABILITATION ACT IN 1973 AND SHALL BE AVAILABLE TO INDIVIDUALS ALLEGING DISCRIMINATION ON THE BASIS OF DISABILITY AND VIOLATION OF THE STATUTE. ALL THREE, JUDICIARY, ENERGY AND COMMERCE, AND PUBLIC WORKS AND TRANSPORTATION, WHEN REFERRING TO TITLE III, AT A MINIMUM, ACKNOWLEDGE THAT THE UNITED STATES HAS AUTHORITY TO BRING THOSE CLAIMS.

SO, AT BEST, LEGISLATIVE HISTORY, ONCE AGAIN, IS INCONCLUSIVE.

THE UNITED STATES THEN TURNS AND SAYS, WELL, IF YOU LOOK PAST THE STATUTORY TEXT AND YOU GO THROUGH THE LEGISLATIVE

HISTORY, YOU SHOULD RELY ON OUR RULES BECAUSE OUR RULES SAY THAT WE HAVE AUTHORITY TO DO IT. YOUR HONOR, THE PROBLEM WITH THAT, AS THE SOUTHERN DISTRICT OF FLORIDA RECOGNIZED, IS THAT AN AGENCY CANNOT CREATE A PRIVATE RIGHT OF ACTION OR ANY RIGHT OF ACTION WHERE CONGRESS HAS NOT. THAT IS ABSOLUTE LAW COMING FROM THE ANDERSON AGAINST SANDOVAL DECISION WHICH WE'VE ALREADY DISCUSSED FROM THE SUPREME COURT IN 2001.

PUT DIFFERENTLY, THE SUPREME COURT IN 1986'S DECISION OF LYNG AGAINST PAYNE SAID, AN AGENCY'S POWER IS NO GREATER TO IT THAN THAT DELEGATED TO IT BY CONGRESS.

SO IF THIS COURT, WHICH CHEVRON ITSELF POINTS OUT IN FOOTNOTE EIGHT, INTERPRETS THESE STATUTES AS NOT INCLUDING THE UNITED STATES AS A PARTY, THAT ENDS THE INQUIRY, AND YOU DON'T GET TO THE REGULATIONS.

THEY SIMPLY DON'T HAVE THE AUTHORITY TO BRING A CLAIM UNDER TITLE II. AND I THINK MS. ROSS PUT IT IN THE PROPER CONTEXT. IF YOU'RE LOOKING AT QUESTIONS OF DISABILITIES WITHIN EDUCATION, THE I.D.E.A. IS THE STATUTE THAT ADDRESSES EXACTLY WHAT THE UNITED STATES COMPLAINS OF IN THIS LAWSUIT. AND IT'S THEIR QUESTIONING OF THE I.D.E.A.'S IEP TEAMS THAT IS THE ESSENCE OF THIS LAWSUIT. IT'S THOSE TEAMS THAT PLACE STUDENTS AFTER THOROUGH REVIEWS IN A GNETS PROGRAM BECAUSE THEY FIND THAT'S WHERE THEY WILL GET THEIR BEST EDUCATION SERVICES.

THE PROBLEM THE JUSTICE DEPARTMENT RUNS INTO, THOUGH, IS, THEY CAN'T ENFORCE THE I.D.E.A. THAT IS LIMITED TO THE

UNITED STATES DEPARTMENT OF EDUCATION AT 20 U.S.C. 1416. AND SO THIS CASE, WHICH SEEKS TO TRANSFORM THE AMERICANS WITH DISABILITIES ACT INTO A PARALLEL OF THE I.D.E.A., FAILS FOR THE REASONS INITIALLY OF STANDING THAT CONGRESS HAS PROVIDED.

BUT IF THIS COURT WANTED TO MOVE BEYOND THE QUESTION OF STATUTORY STANDING AND LOOK TO THE HEART OF THE COMPLAINT, IT SHOULD STILL DISMISS THE COMPLAINT BECAUSE IT FAILS TO STATE A CLAIM FOR TWO REASONS. ONE, THE STATE OF GEORGIA DOES NOT ADMINISTER THE GNETS PROGRAM. AND WITHIN THAT IT RAISES THE QUESTION OF WHETHER THE STATE OF GEORGIA IS A PROPER PARTY.

AND, TWO, AS MS. ROSS ALLUDED TO, THEY FAILED TO ALLEGE THAT ANY TREATMENT PROFESSIONAL HAS DETERMINED THAT ANY STUDENT WITHIN THE GNETS PROGRAM IS BEST SUITED FOR COMMUNITY PLACEMENT OR COMMUNITY EDUCATION SERVICES.

WHILE THE CASE IS STATUTORILY BASED ON 42 U.S.C. 12133, IT IS BASED, AS THE COMPLAINT MAKES CLEAR, ON PARAGRAPHS 19, 69, AND 72, AT LEAST, BASED ON WHAT'S KNOWN AS THE INTEGRATION MANDATE, WHICH IS FOUND IN 28 C.F.R. 35.130, SO PARAGRAPH (D). THAT'S IN TAB A OF YOUR NOTEBOOK, AND I'LL SET IT UP OVER HERE AS WELL.

THE COURT: WHILE YOU'RE DOING THAT, WHAT SAY YOU WITH RESPECT TO WHETHER THE ISSUE OF CONTROLLING OR ADMINISTERING IS IN SOME WAYS A FACT QUESTION?

MR. BELINFANTE: AT BEST, YOUR HONOR, IN SOME WAYS IT IS. BUT THE ALLEGATIONS HERE ARE PLED IN A LEGAL CONTEXT. AND

IF YOU LOOK AT THE STATE CONSTITUTION AND YOU LOOK AT THE STATE STATUTE AND THE STATE RULE, THAT LIMITS THE STATE BOARD OF EDUCATION TO EFFECTIVELY FUNDING.

THE STATE DOES HAVE AUTHORITY TO OPERATE SPECIAL EDUCATION SCHOOLS. AND THE UNITED STATES INTERPRETS THE COX DECISION AS GOING THAT WAY. BUT THERE ARE SPECIFIC SCHOOLS. THERE ARE THREE SCHOOLS IN GEORGIA FOR THE BLIND AND DEAF THAT THE STATE OPERATES. SO AS A MATTER OF LAW, THE STATE CANNOT ADMINISTER THE GNETS PROGRAM. AND THEY HAVE NOT ALLEGED AS A QUESTION OF FACT WHETHER THE STATE THAT THE STATE IS VIOLATING ITS OWN LAW. THAT'S A PROBLEM THAT THE COMPLAINT SIMPLY DOESN'T ADDRESS.

AND STRAIGHT TO THAT POINT, THE WORD ADMINISTER COMES FROM THE RULE. AND THAT'S THE FIRST REASON THAT THEY FAIL TO STATE THE CLAIM. THE PARTIES AGREE THAT NEITHER THE REGULATION NOR THE ADA ITSELF DEFINES THE WORD ADMINISTER. SO WE OFFERED TWO DICTIONARY DEFINITIONS WHICH THE UNITED STATES HAS NOT CHALLENGED, ONE FROM THE OXFORD ENGLISH DICTIONARY, ONE FROM BLACK'S LAW DICTIONARY. BOTH USE THE WORD MANAGE IN TERMS OF WHAT IT MEANS TO ADMINISTRATE. SO IT MEANS TO EXERCISE SOME TYPE OF OPERATIONAL CONTROL.

AND TO THE COURT'S QUESTION, PARAGRAPH 24 OF THE COMPLAINT IS REPRESENTATIVE OF HOW THE UNITED STATES HAS ALLEGED THE TYPE OF ADMINISTRATION IN THE INTEGRATION MANDATE. AND PARAGRAPH 24 SAYS IN PART, THE STATE PLANS, FUNDS,

ADMINISTERS, LICENSES, MANAGES, AND OVERSEES THE GNETS PROGRAM.

THOSE ARE AT LEAST PARTIALLY A LEGAL QUESTION. AND THE IQBAL DECISION SAYS, THIS COURT DOES NOT NEED TO DEFER TO CERTAINLY CONCLUSORY PLEADINGS OF LAW. BUT, AS INDICATED, THE STATE CONSTITUTION ITSELF SAYS IN ARTICLE EIGHT, SECTION ONE, PARAGRAPH ONE, THAT -- EXCUSE ME, ARTICLE EIGHT, SECTION FIVE, PARAGRAPH TWO, THAT EACH SCHOOL SYSTEM SHALL BE UNDER THE CONTROL AND MANAGEMENT AND CONTROL OF THE BOARD OF EDUCATION, WHICH SHALL BE ELECTED AS PROVIDED BY LAW. THAT'S DISCUSSED IN THE LOCAL SCHOOL BOARDS, WHETHER THEY ARE CITIES OR MUNICIPALITIES -- OR EXCUSE ME, OR COUNTIES.

THE SUPREME COURT OF GEORGIA IN THAT CASE, GWINNETT SCHOOL DISTRICT AGAINST COX IN 2011 WHERE THE MAJORITY OF THE COURT STRUCK THE CHARTER SCHOOL LAW, THERE JUSTICE HUNSTEIN, WRITING FOR THE MAJORITY, SAID THAT LOCAL BOARDS OF EDUCATION HAD THE EXCLUSIVE RIGHT TO ESTABLISH, MAINTAIN, AND CONTROL K-12 PUBLIC EDUCATION. THAT'S SUPPORTED BY GNETS' OWN STATUTE, WHICH IS CODIFIED AT O.C.G.A. 20-2-152(C)(1). THERE IT DESCRIBES WHAT THE STATE BOARD OF EDUCATION -- GETTING TO THE QUESTION OF PARTIES -- WHAT THE STATE BOARD OF EDUCATION DOES REGARDING GNETS. AND WHAT THE GENERAL ASSEMBLY AUTHORIZED IS VERY LIMITED. THE STATE BOARD OF EDUCATION SHALL PROVIDE FOR THE FUNDING WHICH HAS BEEN APPROVED BY THE GENERAL ASSEMBLY FOR THIS PURPOSE FOR SPECIAL EDUCATION PROGRAMS AND DOES NOT LIST ANY TYPE OF OPERATIONAL CONTROL.

NOW, INTERESTINGLY ENOUGH, BY CONTRAST, IT DOES LATER IN THE STATUTE IN SUBPARAGRAPH (C)(1)(E) WHERE IT TALKS ABOUT THE SCHOOLS FOR THE BLIND AND DEAF, OVER WHICH THE STATE BOARD OF EDUCATION DOES EXERCISE ADMINISTRATION, MANAGEMENT, CONTROL. THAT'S SIMPLY NOT THERE AS A MATTER OF LAW FOR PURPOSES OF GNETS.

SO THE ONLY THING THE COURT IS LEFT WITH IS FUNDING BY GRANTS. AND WE CITED THE BACON CASE OUT OF THE FOURTH CIRCUIT. IT SAYS, IF YOU ARE FUNDING A THIRD PARTY TO ACT, THE FUNDER, IN EFFECT, IS NOT LIABLE UNDER THE ADA.

NOW, THIS RAISES THAT THE STATE CANNOT ADMINISTER THE GNETS PROGRAM. WHAT ABOUT THE AGENCIES NAMED IN THE COMPLAINT IN THE OPERATIVE PARAGRAPHS BUT NOT IN THE TITLE. THE FIRST IS THE STATE BOARD OF EDUCATION. WE'VE DISCUSSED THE STATUTORY BASIS OF THE STATE BOARD. IT IS, AT BEST, A FUNDER. THEN IT TALKS ABOUT THE DEPARTMENT OF COMMUNITY HEALTH.

THE DEPARTMENT OF COMMUNITY HEALTH, OR DCH, IS THE STATE MEDICAID AGENCY. IT RECEIVES MEDICAID FUNDS FROM THE FEDERAL GOVERNMENT AND CONTRACTS WITH PROVIDERS TO DISTRIBUTE THOSE. SOME PEOPLE, AS ALLEGED IN THE COMPLAINT, SOME STUDENTS IN THE GNETS PROGRAM ARE SERVED THROUGH MEDICAID DOLLARS. BUT THERE'S NO ALLEGATION THAT MEDICAID IS OPERATING IN A DISCRIMINATORY MANNER.

AT BEST, THERE'S AN ALLEGATION THAT THERE SHOULD BE MORE DOLLARS SPENT ON MEDICAID. WELL, THAT DEBATE HAPPENS

EVERY LEGISLATIVE SESSION AT THE GEORGIA GENERAL ASSEMBLY. IT'S NOT AN ADA COMPLAINT.

THEY THEN NAME THE DEPARTMENT -- OR CITE TO THE DEPARTMENT OF BEHAVIORAL HEALTH AND DEVELOPMENT ON DISABILITIES. DDHDD, AS IT'S KNOWN, RECEIVED MEDICAID DOLLARS FROM THE DEPARTMENT OF COMMUNITY HEALTH. IT THEN CONTRACTS WITH PROVIDERS TO PROVIDE CERTAIN MENTAL HEALTH SERVICES, INCLUDING TO SOME KIDS IN THE GNETS PROGRAM. BUT AS WITH DTH, THERE'S NO ALLEGATION THAT THOSE FUNDS ARE BEING SPENT IN A DISCRIMINATORY MANNER.

AND MOST IMPORTANTLY, THE PERSONS WHO DECIDE HOW THOSE FUNDS ARE GOING TO BE SPENT AT THE INDIVIDUAL CHILD LEVEL, AS MS. ROSS POINTED OUT, BASED ON THE I.D.E.A, ARE LOCAL EDUCATION AGENCIES. IT'S NOT THE STATE. AND SO THAT, AGAIN, THIS KEEPS COMING BACK TO, THIS IS REALLY AN I.D.E.A. CLAIM THAT THE UNITED STATES IS SEEKING TO SHOO ON IN THROUGH THE AMERICANS WITH DISABILITIES ACT. IF THEY WANT TO CHALLENGE THE DECISIONS OF THE IEP TEAM, THEY NEED TO TALK TO THE U.S. DEPARTMENT OF EDUCATION AND HAVE THEM LOOK AT IT FROM AN I.D.E.A. PERSPECTIVE, NOT AN ADA PERSPECTIVE.

AND ON THAT POINT, THE LAW IN THE 11TH CIRCUIT IS, WHEN YOU'RE LOOKING AT WHICH PARTY TO SUE -- AND THIS TYPICALLY COMES UP IN THE CONTEXT OF THE 11TH AMENDMENT WHERE AN INDIVIDUAL SUES THE STATE AS THE STATE. AND THE 11TH AMENDMENT PROHIBITS THAT, SO THROUGH THE EX PARTE YOUNG ANALYSIS, YOU

WOULD SUE, IN THE WORDS OF THE 11TH CIRCUIT IN LUCKEY AGAINST HARRIS, WHICH WILL BE IN OUR FORTHCOMING BRIEF, YOU LOOK AT THE OFFICER WHOSE OFFICE HAD SOME CONNECTION TO THE PROGRAM. AND WE WOULD SUGGEST THAT, HERE, THAT OFFICE IS THE IEP TEAMS AND THOSE THAT ARE ACTUALLY MAKING DECISIONS ABOUT WHERE STUDENTS SHOULD RECEIVE EDUCATION SERVICES.

AND THERE'S A LIST OF DISTRICT COURT DECISIONS THAT WALK THROUGH THAT ANALYSIS THAT WILL BE IN OUR BRIEF AS WELL.

ONE CASE, THOUGH, SPEAKS, I THINK, MORE APPROPRIATELY TO THIS ONE, WHICH IS FROM THE 11TH CIRCUIT IN 2003. IT'S THE CASE OF DOE VERSUS PRYOR AT 344 FEDERAL THIRD 1282. THAT WAS A SUIT BROUGHT AGAINST NOW JUDGE PRYOR, THEN ATTORNEY GENERAL PRYOR, OVER WHAT WAS ALABAMA'S SODOMY LAW IN THE WAKE OF THE LAWRENCE DECISION. AND JUDGE PRYOR HAD INDICATED HE WAS NOT GOING TO ENFORCE THE SODOMY LAW IN THE WAKE OF THE DECISION. AND SO THERE WAS REALLY NOTHING HE WAS GOING TO BE DOING TO ENFORCE THE LAW THAT WAS BEING CHALLENGED.

AND THE 11TH CIRCUIT SAID, WELL, IN THAT CASE, JUDGE CARNES SAID THAT THE ATTORNEY GENERAL HAD NO ROLE WITH RESPECT TO THE PARTIES BECAUSE HE'S INDICATED HE'S NOT ENFORCING IT. AND AFTER LAWRENCE, HE CAN'T ENFORCE IT. THE LINK THAT WAS TYPICALLY YOU WOULD BRING IN THE ATTORNEY GENERAL BECAUSE THEY ARE THE PERSON ENFORCING THE LAW IN THAT CASE COULD NOT, JUST AS HERE, THE STATE CANNOT INTERFERE WITH THE IEP TEAM PURSUANT TO THE I.D.E.A.

BUT YOUR HONOR'S QUESTION ABOUT THE PROPER PARTY RAISED, I THINK, ANOTHER QUESTION THAT SPEAKS TO THE JURISDICTION OF THIS COURT TO DECIDE THE CASE, AND THAT IS CONSTITUTIONAL STANDING. AND ONE OF THE THREE FACTORS OF CONSTITUTIONAL STANDING IS WHETHER THE INJURY ALLEGED IS ACTUALLY TRACEABLE TO THE CONDUCT OF THE DEFENDANT, THE SECOND ELEMENT. HERE, WHAT IS COMPLAINED OF, THAT STUDENTS ARE SEGREGATED IN THE GNETS PROGRAM, THEY ARE NOT STAYING WITH THEIR PEERS IN THE GENERAL EDUCATION CLASSES, AGAIN, THAT DECISION IS NOT COMING FROM THE STATE. IT'S NOT COMING FROM THE STATE BOARD OF EDUCATION. AND IT'S CERTAINLY NOT COMING FROM DCH OR DBHDD.

THE SUPREME COURT ADDRESSED A SIMILAR SITUATION IN THE LUJAN AGAINST WILDLIFE -- EXCUSE ME, THE DEFENDERS OF WILDLIFE DECISION FROM 1992. AND THIS WILL BE IN OUR FORTHCOMING BRIEF AS WELL. THERE THE COURT SAID THAT THE EXISTENCE OF ONE OR MORE ESSENTIAL ELEMENTS OF STANDING IN THAT CASE DEPENDED UPON THE UNFETTERED CHOICES MADE BY INDEPENDENT ACTORS NOT BEFORE THE COURTS AND WHOSE EXERCISE OF BROAD AND LEGITIMATE DISCRETION THE COURTS CANNOT PRESUME EITHER TO CONTROL OR TO PREDICT.

IN THAT CASE, THE PLAINTIFF SUED THE SECRETARY OF AN INTERIOR BECAUSE THEY ALLEGED THAT A RULE HE HAD ABOUT EFFECTIVELY ENVIRONMENTALLY SENSITIVE TRAVEL WAS SUPPOSED TO APPLY ACROSS THE FEDERAL GOVERNMENT AT VARIOUS AGENCIES AND IT

DID NOT. AND SO THEY SUED AND SAID, THESE OTHER AGENCIES WON'T HAVE ENVIRONMENTALLY SENSITIVE TRAVEL IF THE SECRETARY DOES NOT CHANGE THE RULE AND HAVE IT APPLY MORE BROADLY.

AND THAT'S WHEN THE SUPREME COURT SAID, THE REAL PARTY THERE ARE THESE OTHER AGENCIES. IT'S THEIR TRAVEL THAT'S AT ISSUE, NOT THE SECRETARY OF INTERIOR, WHO CAN PROMULGATE A RULE WHICH, GIVEN THE PARALLELS HERE AND THE PARTY OF THE ACTION IS BASED, AT LEAST IMPLIEDLY, ON THE GNETS RULE, IT PUTS IT SQUARELY IN THE CAMP OF LUJAN.

SO WHETHER THE COURT LOOKS AT THIS QUESTION IS ONE OF WHETHER THE STATE ADMINISTERS THE GNETS PROGRAM, WHETHER THE STATE IS A PROPER PARTY, OR WHETHER STANDING HAS BEEN ALLEGED, ANY OF THOSE, IF THE COURT FINDS ARE LACKING, THE MOTION TO DISMISS SHOULD BE GRANTED.

THE NEXT REASON ON THE PRIMA FACIE CASE WAS ALLUDED TO BY MS. ROSS. AND THAT IS THAT, UNDER OLMSTEAD, WHICH IS CITED AND INCORPORATED THROUGHOUT THE COMPLAINT, ISOLATION ITSELF IS NOT ACTIONABLE DISCRIMINATION. JUSTICE GINSBURG WRITING FOR THE MAJORITY SAID ON PAGE 597, IT IS UNJUSTIFIED ISOLATION THAT IS PROPERLY REGARDED AS DISCRIMINATION BASED ON DISABILITY.

AND BECAUSE THE FACTS IN THAT CASE, THE TWO PLAINTIFFS WERE DETERMINED BY THE STATE OF GEORGIA TO BE APPROPRIATE TO RECEIVE SERVICES WITHIN THE COMMUNITY, NOT IN THE STATE HOSPITAL WHERE THEY WERE, AT THE TIME, RECEIVING CARE

AND TREATMENT. BUT -- AND THAT WAS A KEY FACT FOR THE OLMSTEAD COURT, BECAUSE IT RECOGNIZED ON PAGE 601 THAT NOTHING IN THE AMERICANS WITH DISABILITIES ACT OR ITS IMPLEMENTING REGULATIONS CONDONES TERMINATION OF INSTITUTIONAL SETTINGS FOR PERSONS UNABLE TO HANDLE OR BENEFIT FROM COMMUNITY SETTINGS.

IN FACT, IT CONTINUES TO SAY, ABSENT SUCH QUALIFICATION, IT WOULD BE INAPPROPRIATE TO REMOVE A PATIENT FROM THE MORE RESTRICTIVE SETTING, WHICH GOES TO THE WORD APPROPRIATE WITHIN THE COMPLAINT ITSELF. EVERY CASE FROM OLMSTEAD, INCLUDING THE CASES CITED BY DAY, WHICH IS THE CASE RELIED ON BY THE UNITED STATES IN ITS BRIEF ON THIS POINT, THERE HAS BEEN SOME DETERMINATION BY A TREATMENT PROFESSIONAL THAT THE PERSON OF WHOM THE HARM WAS ALLEGED WAS APPROPRIATE -- COULD APPROPRIATELY RECEIVE COMMUNITY SERVICES.

THE DAY CASE IS THE ONE THAT THE UNITED STATES RELIES ON. BUT DAY IS LARGELY IRRELEVANT TO THIS LAWSUIT, BECAUSE, IN DAY, THE QUESTION WAS, IN DETERMINING WHETHER COMMUNITY SERVICES ARE APPROPRIATE, DO YOU HAVE TO USE THE STATE'S TREATMENT PROFESSIONALS, WHICH IS CANDIDLY WHAT THE WORDS OF OLMSTEAD SAYS, OR CAN YOU USE ANY TREATMENT PROFESSIONALS. AND THE ANSWER WAS HELD IN DAY AND THE CASES IT CITES, ANY TREATMENT PROFESSIONALS. AND IN DAY, JUST AS IN THE FIVE CASES IT CITES, THERE WERE ALLEGATIONS THAT A TREATMENT PROFESSIONAL HAD DETERMINED THAT COMMUNITY SERVICES WERE APPROPRIATE FOR THE INDIVIDUALS NAMED.

WE HAVE ZERO REFERENCE TO ANY INDIVIDUAL IN THIS CASE. WE HAVE ZERO REFERENCE TO ANY TREATMENT PROFESSIONAL IN THIS CASE. THE UNITED STATES CITES TO PARAGRAPHS 37 THROUGH 43 IN ITS BRIEF TO ANSWER THIS POINT. BUT THE WORDS TREATMENT PROFESSIONALS ARE NOT THERE. THEY SIMPLY SAY PEOPLE CAN EXPERIENCE EDUCATIONAL BENEFITS IN A GENERAL EDUCATION SETTING. WE DON'T DISAGREE WITH THAT.

BUT THE QUESTION AND WHAT OLMSTEAD MAKES CLEAR IS, TO STATE A CLAIM OF DISCRIMINATION UNDER THE ADA, THE FIRST ELEMENT THAT A PLAINTIFF HAS TO SHOW IS -- AND THIS IS PAGE 607 OF THE COMPLAINT -- OR THE CASE, THAT THE STATE'S TREATMENT PROFESSIONALS DETERMINE THAT SUCH TREATMENT IS APPROPRIATE. AND THAT'S WHAT THE RULE SAYS. THERE IS SIMPLY NO ALLEGATION OF THAT IN THIS CASE AT ALL. AND FOR THAT REASON, THE CASE SHOULD BE DISMISSED.

LAST, YOUR HONOR, THE QUESTION OF REDRESSABILITY AND WHETHER RELIEF CAN BE GRANTED AND WHETHER WHAT THE UNITED STATES IS SEEKING IS REALLY AN IMPERMISSIBLE OBEY-THE-LAW INJUNCTION. WE TOOK THE COURT'S QUESTION TO GO TO THE QUESTION, AGAIN, OF CONSTITUTIONAL STANDING. AND HERE REDRESSABILITY AND WHETHER IT IS LIKELY, AS OPPOSED TO MERELY SPECULATIVE, THAT THE INJURY WILL BE REDRESSED BY A FAVORABLE DECISION.

AND AS IN MANY CASES, THIS QUESTION IS SOMEWHAT INTERTWINED WITH THAT TRACEABILITY AND PROPER PARTY ANALYSIS AS

WELL. THE SUPREME COURT ADDRESSED A SIMILAR CASE IN ALLEN AGAINST WRIGHT IN 1984. IT'S AT 469 UNITED STATES 737. IN ALLEN, A GROUP OF PLAINTIFFS SUED THE INTERNAL REVENUE SERVICE BECAUSE THEY CLAIM THAT PRIVATE SCHOOLS, CERTAIN PRIVATE SCHOOLS THROUGHOUT THE COUNTRY WERE PRACTICING DISCRIMINATORY ADMISSIONS POLICIES AND, AS SUCH, THEY SHOULD LOSE THEIR TAX EXEMPT STATUS. THE SUPREME COURT SAID, YOU DON'T HAVE STANDING TO BRING THAT CLAIM AND YOU DON'T BECAUSE YOU'RE TALKING ABOUT ACTIONS OF A THIRD PARTY, YET, SUING THE UNITED STATES INTERNAL REVENUE SERVICE. AND THERE'S NO INDICATION THAT IF THE UNITED STATES INTERNAL REVENUE SERVICE WERE TO REVOKE THE TAX EXEMPT STATUS OF THESE SCHOOLS, THAT THEY WOULD STOP PRACTICING THESE DISCRIMINATORY PRACTICES.

AND WHAT THE COURT SAID AND USED SOME FAIRLY BROAD LANGUAGE WHICH APPLIES SQUARELY TO THIS CASE BECAUSE HERE THE UNITED STATES IS NOT CHALLENGING ANYTHING THE STATE DOES. WHAT IT'S REALLY CHALLENGING AT ITS HEART IS WHAT THE IEP TEAMS DO, HOWEVER IT'S DRESSED UP. IT'S THE DECISION OF WHERE TO -- THESE CHILDREN SHOULD RECEIVE EDUCATION SERVICES.

AND WHAT THE SUPREME COURT SAID ABOUT THAT IN ALLEN IS THAT SUITS CHALLENGING NOT SPECIFICALLY IDENTIFIABLE GOVERNMENT VIOLATIONS OF LAW BUT THAT PARTICULAR PROGRAMS, AGENCIES ESTABLISHED TO CARRY OUT THEIR LEGAL OBLIGATIONS ARE, EVEN WHEN PREMISED ON ALLEGATIONS OF SEVERAL INSTANCES OF VIOLATIONS OF LAW, RARELY, IF EVER, APPROPRIATE FOR FEDERAL

COURT ADJUDICATION.

LUJAN SAYS THE SAME THING IN SECTION 3(B) OF THE OPINION, WHICH WAS AT THE TIME OF PLURALITY BUT HAS SINCE BEEN ADOPTED BY THE 11TH CIRCUIT IN THE ALABAMA TOMBIGBEE RIVERS COALITION CASE AGAINST NORTON, WHICH WILL BE CITED IN OUR FORTHCOMING BRIEF AS WELL.

A MORE RECENT CASE WHICH ADDRESSES SOMETHING SIMILAR HERE IS ONE THAT WAS UNPUBLISHED BY THE 11TH CIRCUIT BUT CAME OUT ON MARCH 29TH OF THIS YEAR. THAT CASE WAS DAOGARU VERSUS THE UNITED STATES ATTORNEY GENERAL. IT'S AT 2017 WESTLAW 1160882. MR. DAOGARU WAS A GEORGIA RESIDENT WHO RECENTLY CAME FROM MICHIGAN. IN MICHIGAN, HE HAD SOME TYPE OF CONVICTION WHICH PROHIBITED HIM UNDER FEDERAL LAW FROM OBTAINING A FIREARMS LICENSE. SO HE SUED THE ATTORNEY GENERAL SEEKING TO GET HIS FIREARM LICENSE. AND THE 11TH CIRCUIT AFFIRMED THIS COURT, THE DISTRICT COURT, AND SAID THAT, EVEN IF MR. DAOGARU COULD HAVE THE FEDERAL HURDLE CLEARED, SO TO SPEAK, GEORGIA LAW PREVENTED HIM FROM GETTING HIS FIREARMS LICENSE. SO THE COURT COULD NOT ISSUE A REMEDY FOR HIS UNDERLYING HARM OF NOT GETTING A LICENSE.

THAT'S THE CASE HERE. WHATEVER THIS COURT ORDERS AGAINST THE STATE OF GEORGIA OR, LET'S EVEN SAY THE STATE BOARD OF EDUCATION, SHORT OF EFFECTIVELY CLOSING DOWN THE GNETS PROGRAM, WHICH THE UNITED STATES IS NOT AT LEAST EXPLICITLY ASKING THE COURT TO DO, THOSE DECISIONS ARE STILL GOING TO BE

MADE AT THE LOCAL LEVEL. THERE'S NOT A -- AND SO THAT IS ANOTHER REASON WHY THE RELIEF THEY SEEK IS NOT PERMISSIBLE AS A STANDING MATTER.

LAST, YOUR HONOR, AS WE ALLEGE, OR AS WE ARGUE IN OUR BRIEF, THE COMPLAINT SEEKS A CLASSIC OBEY-THE-LAW INJUNCTION. AND THE STANDARD THERE, IT'S IN THE ELEND VERSUS BASHAM DECISION WE CITE IN OUR BRIEF IN THE 11TH CIRCUIT IN 2006, BUT PERHAPS A BETTER ARTICULATION IS IN MEYER VERSUS BROWN ROOT CONSTRUCTION COMPANY FROM THE FIFTH CIRCUIT IN 1981. AND IT SAYS THERE THAT THE CONDUCT THAT HAS BEEN ENJOINED HAS TO BE SUCH THAT IT WILL LET THE PARTIES SUBJECT TO IT KNOW WHAT CONDUCT THE COURT HAS PROHIBITED.

AND IF THE COURT LOOKS AT THE AD DAMNUM CLAUSES AND SPECIFICALLY TO THE INJUNCTIVE RELIEF IN THE AD DAMNUM CLAUSES IN THIS COMPLAINT, THE SECOND ONE IS A CLASSIC OBEY-THE-LAW INJUNCTION. IT ORDERS THE STATE, OR SEEKS AN ORDER FOR THE STATE TO CEASE DISCRIMINATING AGAINST THOSE IN OR AT SERIOUS RISK OF ENTERING THE GNETS PROGRAM BY FAILING TO PROVIDE MENTAL HEALTH AND THERAPEUTIC SERVICES AND SUPPORT IN THE MOST INTEGRATIVE SETTING APPROPRIATE TO THEIR NEEDS.

THEY HAVE TAKEN THE RULE AND THEY HAVE MADE IT AN INJUNCTION. THAT HAS VERY LITTLE DIFFERENCE FROM WHAT THE FIFTH CIRCUIT ADDRESSED IN THE CASE OF PAYNE VERSUS TRAVENOL LABS IN 1978 WHERE THE COURT THERE PROHIBITED THE DEFENDANT FROM DISCRIMINATING ON THE BASIS OF COLOR, RACE, OR SEX IN

EMPLOYMENT PRACTICES OR CONDITIONS IN EMPLOYMENT IN DEFENDANT'S CLEVELAND, MISSISSIPPI, FACILITY.

THE FIRST PART OF THE AD DAMNUM CLAUSE GIVES NO CLARITY AS TO WHAT IT WOULD INCLUDE. AND I CAN TELL YOU THAT TWO LAWYERS WOULD HAVE TO HIRE PROBABLY FOUR EXPERTS, AND THEY WOULD COME UP WITH ABOUT 20 DIFFERENT THINGS FOR WHAT THIS ONE ASKS. AND IT'S THAT THEY ASK FOR AN INJUNCTION TO PROVIDE APPROPRIATE, INTEGRATIVE MENTAL HEALTH THERAPEUTIC EDUCATION SERVICES AND SUPPORTS THAT ARE DESIGNED TO ALLOW STUDENTS WITH BEHAVIORAL-RELATED DISABILITIES TO BE PLACED IN INTEGRATED GENERAL EDUCATION CLASSROOMS, SETTINGS, AND ACCESS TO EQUAL EDUCATIONAL OPPORTUNITIES TO THOSE THAT ARE AT OR IN SERIOUS RISK OF ENTERING THE GNETS PROGRAM. THOSE QUESTIONS OF APPROPRIATE SERVICES AND ACCESS TO EQUAL EDUCATIONAL OPPORTUNITIES ARE DEBATED THROUGHOUT THIS COUNTRY EVERY DAY AT LEGISLATURES, AT SCHOOL BOARDS, AND IN THE UNITED STATES CONGRESS. THAT ORDER PROVIDES THE STATE -- OR WOULD PROVIDE THE STATE WITH NO GUIDANCE AS TO WHAT IT ACTUALLY MEANS.

UNLESS THE COURT HAS ANY OTHER QUESTIONS, I WOULD REST AND HAVE MS. ANDERSON DISCUSS THE STAY ISSUE.

THE COURT: I DO NOT HAVE ANY OTHER QUESTIONS. THANK YOU, SIR.

MR. BELINFANTE: THANK YOU, JUDGE.

MS. ANDERSON: YOUR HONOR, I'LL BE RATHER BRIEF. AS YOU ARE WELL AWARE, THIS COURT HAS THE BROAD DISCRETION TO

MANAGE AND CONTROL ITS DOCKET. AND, GIVEN THE RECENT DECISION IN THE DUDEK CASE, WE BELIEVE THAT A STAY WOULD BE WARRANTED HERE TO -- JUST SO THE 11TH CIRCUIT CAN ADDRESS THE ISSUE THAT IS DIRECTLY BEFORE THIS COURT AS TO WHETHER THE UNITED STATES HAS STANDING TO ENFORCE TITLE II OF THE ADA.

COURTS IN THE 11TH CIRCUIT HAVE ESTABLISHED A THREE-FACTOR TEST TO DETERMINE WHETHER A STAY IS WARRANTED IN THIS CERTAIN INSTANCE. ITS FIRST -- THE FIRST FACTOR IS IF THERE'S UNDUE PREJUDICE OR A TACTICAL DISADVANTAGE TO THE NONMOVANT, IN THIS CASE WOULD BE THE DEPARTMENT OF JUSTICE.

THE SECOND FACTOR IS WHETHER A STAY WILL SIMPLIFY THE ISSUES BEFORE THIS COURT.

AND THE THIRD IS ESSENTIALLY STATUS OF THE LITIGATION OR WHETHER DISCOVERY IS COMPLETE AND A TRIAL DATE HAS BEEN SET.

YOUR HONOR, THIS IS A BALANCING TEST. YOU WEIGH THE FACTORS. AND WE BELIEVE APPLYING THIS TEST WOULD INDICATE THAT A STAY IS NECESSARY.

FIRST, YOUR HONOR, THERE WOULD BE NO PREJUDICE OR TACTICAL DISADVANTAGE TO THE DEPARTMENT OF JUSTICE. THAT -- IN THEIR BRIEF, THE DEPARTMENT OF JUSTICE HAS ALLEGED THAT A STAY WOULD DAMAGE STUDENTS WITH DISABILITIES. QUITE FRANKLY, YOUR HONOR, THE STUDENTS ARE NOT PARTIES TO THIS ACTION. AND THE FACTOR CLEARLY SAYS TO NONMOVANT. AND NOR DOES THE DOJ REPRESENT THE STUDENTS HERE.

ADDITIONALLY, YOUR HONOR, THIS LAWSUIT HAS BEEN IN

THE WORKS FOR QUITE SOME TIME PRIOR TO THE FILING OF THE ACTUAL ACTION, AND IT WILL NOT BE RESOLVED IMMEDIATELY. THE DOJ INITIATED ITS INVESTIGATION IN 2012 AND MADE, MADE -- ISSUED A LETTER OF FINDINGS. THE PARTIES NEGOTIATED OVER A YEAR PRIOR TO THE FILING OF THIS LAWSUIT. AND THE DOJ ADMITS IN THE COMPLAINT THAT THE STATE OF GEORGIA ACTED -- PUT FORTH GOOD-FAITH EFFORTS IN ADDRESSING THOSE ISSUES.

MOST IMPORTANTLY, YOUR HONOR, IN ITS COMPLAINT, THE DOJ DID NOT MOVE FOR A PRELIMINARY INJUNCTION OR A TEMPORARY RESTRAINING ORDER TO HALT THE IMPLEMENTATION OF THE GNETS PROGRAM. THEREFORE, THROUGHOUT THIS LITIGATION, THE GNETS PROGRAM WILL CONTINUE TO SERVE THOSE STUDENTS WHO HAVE EMOTIONAL, BEHAVIORAL, OR SEVERE EMOTIONAL AND BEHAVIOR DISORDERS.

YOUR HONOR, BOTH PARTIES IN THE JOINT PRELIMINARY REPORT RECOGNIZE THAT THIS CASE IS COMPLEX. IT WILL REQUIRE A GREATER THAN NORMAL VOLUME OF EVIDENCE. WE WILL HAVE NUMEROUS EXPERTS TESTIFY AND WILL REQUIRE AT LEAST AN ADDITIONAL FOUR MONTHS OF DISCOVERY.

THE DOJ HAS NOT ASKED FOR ANY EXPEDITED PROCEEDINGS. AND STUDENTS WILL CONTINUE TO RECEIVE SERVICES ON OTHER GNETS PROGRAMS.

FOR THE SECOND FACTOR, A STAY WILL UNDOUBTEDLY SIMPLIFY THE ISSUES. AS I MENTIONED EARLIER AND ACTUALLY HAVE MENTIONED, THIS CASE AND THE DUDEK ACTION ADDRESSES THE EXACT

SAME ISSUE AS IT PERTAINS TO THE UNITED STATES, WHETHER THE UNITED STATES HAS STANDING TO BRING A CLAIM UNDER TITLE II OF THE ADA.

YOUR HONOR, THE 11TH CIRCUIT IN MICCOSUKEE TRIBE OF INDIANS OF FLORIDA VERSUS THE SOUTH FLORIDA WATER MANAGEMENT SYSTEM HAS NOTED THAT, WHEN THERE IS -- WHEN TWO FEDERAL LITIGATIONS WILL ADDRESS THE SAME ISSUE, THIS IS AN EXCELLENT REASON TO STAY. A STAY WOULD AVOID DUPLICATIVE LITIGATION AND AVOID POTENTIALLY CONFLICTING DECISIONS IN THE CIRCUIT.

JUST BY WAY OF A BRIEF UPDATE, FOR THE DUDEK CASE, THE UNITED STATES HAS MADE CLEAR IT WILL APPEAL THE COURT'S RULING ONCE THERE IS A FINAL DISPOSITION. BECAUSE THE CASES WERE CONSOLIDATED, THE UNITED STATES HAS TO WAIT UNTIL ALL OF THE PARTIES HAVE BEEN RESOLVED. IT IS OUR UNDERSTANDING THAT THE STATE OF FLORIDA MOVED FOR SUMMARY JUDGMENT AS TO THE REMAINING PARTIES. THE MAGISTRATE JUDGE RECOMMENDED SUMMARY JUDGMENT BE GRANTED. AND AT THIS POINT, IT'S JUST WAITING FOR THE DISTRICT COURT TO ENTER OR MODIFY THE MAGISTRATE JUDGE ORDER AND, AT THAT POINT, AN APPEAL COULD BE HAD TO THE 11TH CIRCUIT.

FINALLY, FOR THE THIRD FACTOR, NO DISCOVERY HAS TAKEN PLACE. AND COSTS CURRENTLY REMAIN MINIMAL HERE. AND IT WOULD BE UNNECESSARY EXPENSES FOR THE GEORGIA TAXPAYERS AS WELL AS FEDERAL TAXPAYERS TO CONDUCT DISCOVERY IF THE 11TH CIRCUIT EVENTUALLY AGREES WITH THE DECISION IN DUDEK.

YOUR HONOR, IN THEIR RESPONSE, THE DEPARTMENT OF JUSTICE BRINGS UP OR ALLEGES THAT THIS WOULD BE AN IMMODERATE OR AN INDEFINITE STAY. AS ENTERED EARLIER, THIS COURT HAS GREAT DISCRETION IN CRAFTING A STAY HOWEVER IT SO DESIRES. THAT MEANS IT CAN -- THIS COURT COULD PUT A TEMPORAL LIMITATION ON IT, SAY, YOU KNOW, STAY THE CASE FOR A YEAR OR UNTIL THE 11TH CIRCUIT DECIDES THE DUDEK CASE, WHICHEVER IS SOONER, WITH OPTION TO RENEW THE STAY.

THIS IS ACTUALLY WHAT HAPPENED IN THE MICCOSUKEE CASE, WHICH THE COURT DETERMINED WAS A REASONABLE STAY IN THAT INSTANCE, AND COULD ALSO REQUIRE THE PARTIES TO, TO PROVIDE PERIODIC REPORTING.

YOUR HONOR, IT IS PRUDENT TO WAIT -- OR WE BELIEVE IT IS PRUDENT TO WAIT UNTIL THE 11TH CIRCUIT HAS RENDERED ITS OPINION IN DUDEK, AS OPPOSED TO INITIATING POTENTIALLY UNNECESSARY DISCOVERY. THIS WOULD PRESERVE JUDICIAL AND STATE AND FEDERAL RESOURCES -- AS I MENTIONED, THE TAXPAYERS ARE BEARING THE BRUNT OF THIS LAWSUIT -- AND WOULD AVOID POTENTIALLY DUPLICATIVE LITIGATION IN THE SAME CIRCUIT.

THANK YOU.

THE COURT: THANK YOU.

ALL RIGHT. LET'S GO AHEAD AND TAKE A BRIEF BREAK, MAYBE TEN MINUTES, BEFORE WE HEAR FROM THE UNITED STATES. THANK YOU SO MUCH. WE'RE IN RECESS.

THE COURTROOM SECURITY OFFICER: ALL RISE. COURT

STANDS IN RECESS FOR TEN MINUTES.

(WHEREUPON, A BRIEF RECESS WAS HAD FROM 11:12 A.M. TO 11:24 A.M.)

THE COURT: THANK YOU. YOU MAY BE SEATED. THANK YOU SO MUCH.

ALL RIGHT. ON BEHALF OF THE UNITED STATES, ARE YOU READY TO PROCEED?

MS. ROBIN-VERGEER: YES, YOUR HONOR.

THE COURT: ALL RIGHT. THANK YOU.

MS. ROBIN-VERGEER: GOOD MORNING, YOUR HONOR.

THE COURT: GOOD MORNING.

MS. ROBIN-VERGEER: MY NAME IS BONNIE ROBIN-VERGEER, AND I'M HERE ON BEHALF OF THE UNITED STATES. I WILL ADDRESS GEORGIA'S ARGUMENT THAT THE ATTORNEY GENERAL HAS NO CAUSE OF ACTION TO ENFORCE TITLE II AND ALSO, IN THE ALTERNATIVE, THEY ARE MOVING FOR A STAY. MY COLLEAGUE, TRAVIS ENGLAND, WILL ADDRESS THE REMAINING ISSUES.

I'D LIKE TO START BY GIVING THE COURT AN OVERVIEW OF OUR ARGUMENT. AND THEN I'LL WALK YOUR HONOR THROUGH THE STEPS OF THE ARGUMENT AND ALSO ADDRESS GEORGIA'S COUNTER-ARGUMENTS.

THE ADA'S TEXT, PURPOSES, AND OVERALL STATUTORY SCHEME ESTABLISH THAT CONGRESS INTENDED THE FEDERAL GOVERNMENT TO PLAY A CENTRAL ROLE IN ENFORCING THE ADA, INCLUDING TITLE II, WHICH COVERS PUBLIC ENTITIES. THE STATUTE STATES IN THE TEXT THAT ONE OF ITS PURPOSES IS TO ENSURE THAT THE FEDERAL

GOVERNMENT PLAYS A CENTRAL ROLE IN ENFORCING THE STANDARDS ESTABLISHED IN THIS CHAPTER ON BEHALF OF INDIVIDUALS WITH DISABILITIES.

AND I'M REFERRING TO SECTION 12101(B)(3). TITLE II IS PART OF THIS CHAPTER. AND CONSISTENT WITH THAT PURPOSE, TITLE II'S ENFORCEMENT SECTION GIVES THE ATTORNEY GENERAL A CAUSE OF ACTION. AND LET ME JUST SAY, THAT IS THE QUESTION HERE. DOES THE ATTORNEY GENERAL HAVE A CAUSE OF ACTION TO ENFORCE TITLE II.

THE WORD STANDING HAS BEEN KIND OF THROWN AROUND A BIT LOOSELY HERE. AND SUBJECT MATTER JURISDICTION IS NOT IMPLICATED BY THE QUESTION. IT'S JUST A STRAIGHT QUESTION OF STATUTORY CONSTRUCTION.

ALTHOUGH THE STATUTORY BACKDROP IS COMPLICATED, THE ARGUMENT THAT THE ATTORNEY GENERAL HAS A RIGHT OF ACTION IS ACTUALLY PRETTY SIMPLE. CONGRESS INCORPORATED INTO TITLE II'S ENFORCEMENT SECTION THE REMEDIES, PROCEDURES, AND RIGHTS OF SECTION 505 OF THE REHABILITATION ACT. AND SECTION 505, IN TURN, INCORPORATED THE REMEDIES, PROCEDURES, AND RIGHTS OF TITLE VI OF THE CIVIL RIGHTS ACT. AND THESE REMEDIES, PROCEDURES, AND RIGHTS INCLUDE THE POSSIBILITY OF A LAWSUIT BY THE ATTORNEY GENERAL TO ENFORCE THE STATUTE'S NONDISCRIMINATION REQUIREMENTS.

SO AMONG THE REMEDIES, PROCEDURES, AND RIGHTS THAT TITLE II PROVIDES, PROVIDES TO A PERSON IS AN ADMINISTRATIVE

ENFORCEMENT PROCESS THAT MAY CULMINATE IN A SUIT BY THE ATTORNEY GENERAL. AND THE JUSTICE DEPARTMENT HAS BEEN ENFORCING TITLE II FOR MORE THAN 25 YEARS THROUGH THE ADMINISTRATIVE PROCESS, THROUGH SETTLEMENT AGREEMENTS, AND THROUGH LAWSUITS WHEN EFFORTS TO ACHIEVE VOLUNTARY COMPLIANCE ARE NOT SUCCESSFUL. AN AMICI BRIEF THAT'S BEEN FILED IN THIS CASE GIVES AN OVERVIEW OF THE DEPARTMENT'S ENFORCEMENT EFFORTS REGARDING TITLE II.

BUT IF THE COURT CONCLUDES THAT THE ENFORCEMENT SECTION IS AMBIGUOUS, THEN THE ADA'S LEGISLATIVE HISTORY AND DEFERENCE TO THE DEPARTMENT OF JUSTICE'S REGULATIONS SHOULD RESOLVE THE QUESTION.

THE LEGISLATIVE HISTORY IS CRYSTAL CLEAR AS REFLECTED IN BOTH HOUSE AND SENATE COMMITTEE REPORTS. THE CONGRESS EXPECTED THAT THE MAJOR ENFORCEMENT SANCTION FOR THE FEDERAL GOVERNMENT FOR TITLE II WOULD BE REFERRAL OF CASES TO THE DEPARTMENT OF JUSTICE SO THAT THE DEPARTMENT MAY PROCEED TO FILE SUITS IN FEDERAL DISTRICT COURT. AND AS FOR THE REGULATIONS, AS CONGRESS DIRECTED, THE DEPARTMENT ISSUED TITLE II REGULATIONS IN PART 35 OF 28 C.F.R. AND THE REGS PROVIDE THAT IF VOLUNTARY COMPLIANCE BY THE PUBLIC ENTITY IS NOT ACHIEVED, THEN THE FEDERAL AGENCY SHALL REFER THE MATTER TO THE ATTORNEY GENERAL WITH A RECOMMENDATION FOR APPROPRIATE ACTION, I.E., THE POSSIBILITY OF A LAWSUIT.

AND AS I WILL DISCUSS, THE DEPARTMENT'S REGULATION IS

ENTITLED THE CHEVRON DEFERENCE.

GEORGIA'S ARGUMENT THAT THE ATTORNEY GENERAL HAS NO AUTHORITY TO ENFORCE TITLE II RESTS ON A LONE DISTRICT COURT DECISION IN THE SOUTHERN DISTRICT OF FLORIDA LAST FALL IN CV VERSUS DUDEK. AND THIS CASE IS AN OUTLIER. ALL OF THE COURTS THAT HAVE LOOKED AT THIS ISSUE, INCLUDING THE SAME FEDERAL DISTRICT COURT IN AN EARLIER RULING BY JUDGE ROSENBAUM IN THE SAME CASE, HAVE CONCLUDED THAT ATTORNEY GENERAL DOES HAVE A CAUSE OF ACTION TO ENFORCE TITLE II.

AND JUST TWO WEEKS AGO, ANOTHER DISTRICT COURT IN UNITED STATES VERSUS HARRIS COUNTY SQUARELY REJECTED THE HOLDING AND THE RATIONALE OF THE COURT IN DUDEK.

AND NOW I'D LIKE TO WALK YOUR HONOR THROUGH THESE POINTS. BECAUSE THE ENFORCEMENT SECTION OF TITLE II INCORPORATES ENFORCEMENT SCHEME OF THE REHABILITATION ACT, WHICH INCORPORATES THE ENFORCEMENT SCHEME OF TITLE VI, I'D LIKE TO START WITH TITLE VI.

TITLE VI OF THE CIVIL RIGHTS ACT PROHIBITS DISCRIMINATION ON THE BASIS OF RACE, COLOR, OR NATIONAL ORIGIN BY ENTITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE. AND TITLE VI'S ENFORCEMENT SCHEME PROVIDES THAT FEDERAL AGENCIES CAN ACHIEVE COMPLIANCE, ONE, THROUGH ADMINISTRATIVE TERMINATION OF FEDERAL FUNDING; OR, TWO, BY ANY OTHER MEANS AUTHORIZED BY LAW.

FOR THE PAST 50 YEARS, AGENCY REGULATIONS, TITLE VI ENFORCEMENT GUIDELINES, AND COURT DECISIONS HAVE ALL

INTERPRETED THIS SECOND METHOD BY ANY OTHER MEANS AUTHORIZED BY LAW TO GRANT AUTHORITY TO THE UNITED STATES TO BRING SUITS TO ENFORCE TITLE VI'S ANTIDISCRIMINATION REQUIREMENTS. BASICALLY THE REGULATIONS SET UP IN ADMINISTRATIVE ENFORCEMENT SCHEME WITH COMPLAINTS BY INDIVIDUALS, ADMINISTRATIVE COMPLAINTS, COMPLIANCE REVIEWS, INVESTIGATIONS BY THE FEDERAL AGENCIES, AND ULTIMATELY A VOLUNTARY COMPLIANCE CANNOT BE ACHIEVED IN A COMPLAINT THAT'S MERITORIOUS, THE AGENCY CAN REFER THE MATTER TO THE ATTORNEY GENERAL BRINGING THE LAWSUIT.

AND THE TITLE VI GUIDELINES ARE, I KNOW ARE CITED IN OUR BRIEF, BUT JUST TO GIVE YOU ANOTHER EXAMPLE, THE DEPARTMENT OF JUSTICE'S COORDINATION REGULATIONS UNDER TITLE VI, 28 C.F.R. 42.411, ALSO SPEAK IN TERMS OF INCORPORATE THE TITLE VI GUIDELINES, WHICH THEMSELVES EXPLAIN SORT OF THIS RATIONALE THAT COURT ENFORCEMENT IS SORT OF A PREFERRED ALTERNATIVE MECHANISM BECAUSE TERMINATION OF FEDERAL FUNDING IS PRETTY DRASTIC AND IS SEEN SORT OF A LAST RESORT. AND THE FIRST RESORT IS TO TRY TO ACHIEVE COMPLIANCE THROUGH SOME OTHER MEANS, INCLUDING POSSIBLY LAWSUITS.

TITLE VI'S ENFORCEMENT SCHEME FOCUSED ON FEDERAL ENFORCEMENT. IT WAS ALWAYS UNDERSTOOD THAT THE FEDERAL GOVERNMENT COULD TAKE ACTION TO OBTAIN COMPLIANCE. AND WHAT THE FIGHT WAS ALL ABOUT IN THE EARLY YEARS WAS WHETHER THERE WAS AN IMPLIED PRIVATE RIGHT OF ACTION IN ADDITION TO FEDERAL ENFORCEMENT. AND IF THERE WAS A PRIVATE RIGHT OF ACTION, WHAT

WAS ITS SCOPE.

AND THAT'S WHAT A LOT OF THE LITIGATION AND THE SUPREME COURT AND OTHER COURTS IN TITLE VI AND OTHER STATUTES MODELED ON TITLE VI LIKE TITLE IX, THAT'S WHAT THE DISPUTE IN THOSE CASES WAS PRIMARILY ABOUT.

TITLE VI'S ENFORCEMENT SCHEME HAS BEEN USED AS THE MODEL FOR A NUMBER OF CIVIL RIGHTS LAWS LIKE IN TITLE IX, THE REHABILITATION ACT, TITLE II OF THE ADA, AMONG OTHERS. SO IT WAS THIS TITLE VI ENFORCEMENT FRAMEWORK THAT CONGRESS INCORPORATED INTO THE REHABILITATION ACT OF 1973. AND THAT STATUTE WAS PASSED TO EXTEND A PERSONS WITH DISABILITIES, THE BAN ON DISCRIMINATION BY FEDERALLY FUNDED ENTITIES. AND AT THE TIME IT WAS ENACTED IN '73, THE REHABILITATION ACT CONTAINED NO SPECIFIC ENFORCEMENT PROVISION.

IN 1977, THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, WHICH I'M JUST GOING TO CALL HEW, ISSUED REGULATIONS THAT INCORPORATED ITS TITLE VI ENFORCEMENT PROCEDURES. AND THOSE PROCEDURES, LIKE I SAID, AUTHORIZED REFERRALS BY FEDERAL AGENCIES TO THE DEPARTMENT OF JUSTICE TO BRING LAWSUITS.

THEN THE NEXT YEAR, IN 1978, CONGRESS AMENDED THE REHABILITATION ACT TO ACTUALLY ADD SECTION 505, THE ENFORCEMENT PROVISION, WHICH INCORPORATES THE REMEDIES, PROCEDURES, AND RIGHTS, THIS PACKAGE THAT'S SET OUT IN TITLE VI.

THE SUPREME COURT HAS RECOGNIZED THAT, IN ENACTING SECTION 505, CONGRESS INTENDED TO CODIFY THE 1977 HEW REGS

GOVERNING THE ENFORCEMENT OF THE REHABILITATION ACT. THE LEAD CASE ON THAT IS CONSOLIDATED RAIL CORPORATION VERSUS DARRONE. AS CONGRESS INTENDED, THE ATTORNEY GENERAL HAS ENFORCED THE REHABILITATION ACT THROUGH THE ADMINISTRATIVE PROCESS AND THROUGH LITIGATION.

SO HERE'S WHERE WE ARE. BY ENACTING TITLE II'S ENFORCEMENT SECTION, WHICH INCORPORATES THE REMEDIES, PROCEDURES, AND RIGHTS OF THE REHABILITATION ACT AND, THUS, OF TITLE VI, CONGRESS INTENDED THE PERSONS WITH DISABILITIES TO HAVE ACCESS TO THE SAME KIND OF ADMINISTRATIVE ENFORCEMENT PROCESS THAT THEY HAVE UNDER THE REHABILITATION ACT AND UNDER TITLE VI. AND THAT PROCESS INCLUDES THE POSSIBILITY OF A LAWSUIT BY THE ATTORNEY GENERAL.

THIS INTERPRETATION IS SUPPORTED BY THE VERY BASIC PRINCIPLE RECOGNIZED MANY TIMES BY THE SUPREME COURT, THAT WHEN CONGRESS ADOPTS A NEW LAW INCORPORATING PARTS OF A PRIOR LAW, CONGRESS IS PRESUMED TO INCORPORATE THE JUDICIAL AND ADMINISTRATIVE INTERPRETATIONS OF THE PRIOR LAW AS IT AFFECTS THE NEW STATUTE. AND JUST KEY CASES FOR THAT PROPOSITION INCLUDE LORILLARD VERSUS PONS AND BRAGDON VERSUS ABBOTT.

BUT, ESSENTIALLY, THE POINT I'M MAKING IS THIS: CONGRESS RATIFIED THE ADMINISTRATIVE AND JUDICIAL INTERPRETATIONS REGARDING THE ATTORNEY GENERAL'S ENFORCEMENT POWERS WHEN IT INCORPORATED THESE TWO PRIOR STATUTORY SCHEMES INTO TITLE II OF THE ADA.

BUT IF THE COURT THINKS IT'S UNCLEAR WHAT THE ENFORCEMENT PROVISION MEANS, THEN THE LEGISLATIVE HISTORY AND THE REGULATIONS SHOULD RESOLVE THE MATTER. FIRST, THE LEGISLATIVE HISTORY, IT CONFIRMS THAT THE ATTORNEY GENERAL HAS A CAUSE OF ACTION. BOTH HOUSE AND SENATE COMMITTEE REPORTS STATE THAT THE MAJOR ENFORCEMENT SANCTION FOR THE FEDERAL GOVERNMENT UNDER TITLE II WOULD BE REFERRAL OF CASES TO THE DEPARTMENT OF JUSTICE SO THAT THE DEPARTMENT MAY PROCEED TO FILE SUITS IN FEDERAL DISTRICT COURT.

AND YOU HAVE TO REMEMBER A LITTLE BIT THE CONTEXT HERE. TITLE II WAS INTENDED BY CONGRESS TO COVER OR TO CLOSE A GAP THAT HAD BEEN LEFT IN THE REHABILITATION ACT. THE REHABILITATION ACT ONLY COVERS PUBLIC AND PRIVATE ENTITIES THAT RECEIVE FEDERAL FUNDING. WHENEVER THERE IS FEDERAL FUNDING, THERE'S ALWAYS THE POSSIBILITY OF TERMINATION OF THAT FEDERAL FUNDING. THE GOVERNMENT INHERENTLY HAS THAT LEVERAGE IN ADDITION TO THE POSSIBILITY OF GOING TO COURT.

BUT IN COVERING ALL PUBLIC ENTITIES, UNDER TITLE II, WHICH WAS A KEY PURPOSE OF THE STATUTE, AND 11TH CIRCUIT RECOGNIZED THAT IN SHOTZ VERSUS THE CITY OF PLANTATION, THAT LEVERAGE IS GONE.

SO WHAT IS THE LEVERAGE THAT THE FEDERAL GOVERNMENT HAS TO BRING NONCOMPLIANT PUBLIC ENTITIES TO THE TABLE. IT'S THE POSSIBILITY OF A LAWSUIT. AND THAT'S WHAT THE LANGUAGE IN THE SENATE AND THE HOUSE COMMITTEE REPORTS RECOGNIZES. THAT'S

WHY IT WOULD BE SORT OF THE MAJOR ENFORCEMENT MECHANISM.

IN ADDITION, THE DEPARTMENT'S -- AND I SHOULD SAY, ALSO, IN SHOTZ, THE 11TH CIRCUIT CITED THIS LEGISLATIVE HISTORY FAVORABLY BECAUSE THE QUESTION OF TITLE II REMEDIES WAS ACTUALLY AN IMBEDDED QUESTION AND THE QUESTION THAT WAS BEFORE THE 11TH CIRCUIT IN SHOTZ TO KIND OF WALK THROUGH SOME OF THE BACKGROUND ON WHAT THE TITLE II REMEDIAL SCHEME IS OR HOW IT WORKS.

IN ADDITION, THE DEPARTMENT'S TITLE II REGULATIONS ARE ENTITLED TO CONTROLLING WEIGHT UNDER CHEVRON. THE DEPARTMENT ISSUED TITLE II REGS IN PART 35 AS PART OR PURSUANT TO CONGRESS'S DIRECTION THAT THE DEPARTMENT PROMULGATE REGULATIONS THAT ARE CONSISTENT WITH THE COORDINATION REGULATIONS OF THE REHABILITATION ACT AND THE DEPARTMENT DID SO.

SUBPART (F) OF PART 35 SETS OUT COMPLIANCE PROCEDURES WHICH ARE PART OF THE ADMINISTRATIVE PROCESS. AND THESE PROCEDURES PROVIDE FOR THE REFERRAL OF CASES TO THE DEPARTMENT TO TAKE APPROPRIATE ACTION. IN OTHER WORDS, REFER THE MATTER FOR POTENTIAL LAWSUIT. THAT'S IN 28 C.F.R. 35.174. UNDER CITY OF ARLINGTON VERSUS FCC, THIS COURT SHOULD GIVE CHEVRON DEFERENCE TO THIS PROVISION IS A REASONABLE CONSTRUCTION OF THE DEPARTMENT'S AUTHORITY UNDER THE STATUTE.

JUDGE ROSENBAUM AND THE FIRST DUDEK CASE RECOGNIZED THAT AND GAVE DEFERENCE TO THE REGULATION. BUT JUDGE ZLOCH

DISAGREED. AND I THINK THE REASON WHY JUDGE ZLOCH DID NOT GIVE DEFERENCE I THINK IS QUITE TELLING, BECAUSE THE COURT WENT ASTRAY IN DETERMINING THAT A QUESTION, WHETHER THE ATTORNEY GENERAL HAS AUTHORITY TO SUE UNDER TITLE II, IMPLICATED THE COURT'S OWN SUBJECT MATTER JURISDICTION. AND SO THE COURT WASN'T GOING TO DEFER TO THE DEPARTMENT'S VIEW BECAUSE, FOR THAT REASON.

BUT THE QUESTION OF WHETHER THE ATTORNEY GENERAL HAS AUTHORITY TO SUE UNDER TITLE II DOESN'T AFFECT THE COURT'S SUBJECT MATTER JURISDICTION. IT'S JUST STATUTORY CONSTRUCTION QUESTION. THE SUPREME COURT'S BEEN MUCH MORE PRECISE IN THE LAST COUPLE OF DECADES IN DISTINGUISHING BETWEEN SO-CALLED STANDING, ARTICLE THREE CONSTITUTIONAL STANDING, AND QUESTIONS OF STATUTORY CONSTRUCTION.

AND JUST TO CITE YOU ONE EXAMPLE, IN LEXMARK INTERNATIONAL, INC. VERSUS STATIC CONTROL COMPONENTS, THE COURT CLARIFIED THAT THE ABSENCE OF A VALID CAUSE OF ACTION DOESN'T IMPLICATE THE COURT'S OWN JURISDICTION. THIS IS A QUESTION OF THE AGENCY'S AUTHORITY UNDER THE AD -- UNDER TITLE II OF THE ADA. IS THE DEPARTMENT OF JUSTICE ENTITLED TO DEFERENCE IN ITS INTERPRETATION OF THAT QUESTION. AND THE 11TH CIRCUIT GAVE CHEVRON DEFERENCE TO THE TITLE II REGS IN SHOTZ VERSUS CITY OF PLANTATION.

NOW, I WANT, I WANT TO TURN TO GEORGIA'S COUNTER-ARGUMENTS. IT FOCUSES HEAVILY ON THE FACT THAT THE

STATUTORY LANGUAGE USES THE WORD PERSON. AND WE ARE NOT ARGUING THAT THE UNITED STATES OR THE ATTORNEY GENERAL IS A PERSON. BUT THAT DOESN'T MEAN THAT THE ATTORNEY GENERAL HAS NO CAUSE OF ACTION.

WHAT THIS LANGUAGE MEANS IS THAT, AMONG THE REMEDIES AND PROCEDURES PROVIDED TO PERSONS IS AN ADMINISTRATIVE ENFORCEMENT PROCESS THAT MAY CULMINATE IN A LAWSUIT BY THE ATTORNEY GENERAL. NOW, THE COURT IN DUDEK PUT A LOT OF WEIGHT ON PERSON. AND I WANT TO EXPLAIN WHERE I THINK THAT COURT WENT WRONG ANALYTICALLY.

THE COURT SAID THERE, THE CONGRESS DID NOT INCORPORATE ALL REMEDIES, PROCEDURES, AND RIGHTS AVAILABLE UNDER TITLE VI BUT ONLY THOSE REMEDIES, PROCEDURES, AND RIGHTS THAT MAY BE EXERCISED BY A PERSON ALLEGING DISCRIMINATION. BUT THE COURT MADE AN IMPORTANT WORD CHANGE THERE IN READING TITLE II TO AFFORD ONLY THE REMEDIES, PROCEDURES, AND RIGHTS THAT MAY BE EXERCISED BY A PERSON, BUT THAT'S NOT WHAT THE STATUTE SAYS.

INSTEAD, IT SAYS, THE REMEDIES, PROCEDURES, AND RIGHTS OF THE REHABILITATION ACT ARE THOSE THE TITLE II PROVIDES TO ANY PERSON ALLEGING DISCRIMINATION ON THE BASIS OF DISABILITY. AND TO PROVIDE IS TO SUPPLY OR MAKE AVAILABLE, COURTESY OF MERRIAM-WEBSTER.COM. IN OTHER WORDS, CONGRESS HAS MADE AVAILABLE TO A PERSON ALLEGING DISCRIMINATION UNDER TITLE II THE BUNDLE OF A PACKAGE OF REMEDIES, PROCEDURES, AND RIGHTS THAT WERE AVAILABLE TO PERSONS UNDER SECTION 505, WHICH

INCLUDES AN ADMINISTRATIVE ENFORCEMENT SCHEME THAT MAY CULMINATE IN A LAWSUIT BY THE ATTORNEY GENERAL.

THIS INTERPRETATION OF THE STATUTE MAKES SENSE IN SEVERAL WAYS. FOR ONE THING, IT MAKES SENSE OF REENFORCEMENT SECTIONS OF BOTH TITLE II AND THE REHABILITATION ACT. AND IT'S IMPORTANT TO READ THE STATUTES TOGETHER, BECAUSE ONE INCORPORATES THE OTHER. THE WORDING OF THE REHABILITATION ACT'S ENFORCEMENT SECTION IS QUITE SIMILAR. IT'S NEARLY VERBATIM, THE SAME, IN THAT IT PROVIDES THAT THE REMEDIES, PROCEDURES, AND RIGHTS OF TITLE VI SHALL BE AVAILABLE TO ANY PERSON AGGRIEVED BY THE PROHIBITED DISCRIMINATION.

AND THE DEPARTMENT OF JUSTICE HAS BEEN BRINGING LAWSUITS TO ENFORCE THE REHABILITATION ACT FOR YEARS. AND CONGRESS RATIFIED THAT INTERPRETATION WHEN IT ADOPTED, YOU KNOW, THE EXACT SAME PHRASE, THE ONE STATUTE, AND IMPORTED IT INTO THE SECOND.

IT'S ALSO CONSISTENT WITH THE PURPOSE I ALLUDED TO BEFORE OF GIVING A FEDERAL GOVERNMENT A CENTRAL ENFORCEMENT ROLE, BECAUSE IF YOU READ IT THE WAY GEORGIA'S READING IT, THE FEDERAL GOVERNMENT HAS BEEN STRIPPED FROM ENFORCEMENT OF TITLE II OF THE ADA, DESPITE THE LANGUAGE EXPRESSLY IN THE TEXT OF THE STATUTE. THE ONE OF THE KEY PURPOSES IS TO MAKE SURE THE FEDERAL GOVERNMENT HAS ESSENTIAL ROLE IN ENFORCING THE PROVISIONS OF THIS CHAPTER, WHICH INCLUDES TITLE II. AND THE ABILITY OF THE FEDERAL GOVERNMENT TO ENFORCE TITLE II, AS I

EXPLAINED BEFORE, WOULD BE SHARPLY CURTAILED IF THERE WAS NO POSSIBILITY OF A LAWSUIT, BECAUSE THERE WOULD BE NO LEVERAGE FOR THE FEDERAL GOVERNMENT TO BRING TO BEAR ON PUBLIC ENTITIES THAT WERE NOT RECEIVING FEDERAL FUNDING.

THERE'S NO SUGGESTION ANYWHERE IN TITLE II OR ITS LEGISLATIVE HISTORY THAT CONGRESS INTENDED TO TOPPLE ENFORCEMENT OF TITLE II AGAINST PUBLIC ENTITIES THAT ARE NOT RECEIVING FEDERAL FUNDS. THE OPPOSITE IS TRUE, AS THE 11TH CIRCUIT RECOGNIZED IN THE SHOTZ CASE. THE WHOLE POINT OF TITLE II IS TO CLOSE THE GAP LEFT BY THE REHABILITATION ACT, WHICH COVERED ONLY THOSE PUBLIC ENTITIES AND PRIVATE ENTITIES RECEIVING FEDERAL FUNDING, WHEREAS TITLE II APPLIES TO ALL PUBLIC ENTITIES, FEDERAL FUNDING OR NO.

GEORGIA'S READING ALSO MEANS THAT PRIVATE PARTIES WHO HAVE ONLY AN IMPLIED RIGHT OF ACTION TO ENFORCE TITLE VI ARE NOW THE ONLY GAME IN TOWN, AND THEY COULD SUE TO ENFORCE TITLE II, WHILE THE ATTORNEY GENERAL CANNOT. BUT THAT IDEA DOESN'T MAKE ANY SENSE, BECAUSE TITLE VI'S ENFORCEMENT SCHEME ON WHICH ALL THESE SCHEMES ARE PREDICATED CENTERED ON FEDERAL ENFORCEMENT.

NOW, WITH RESPECT TO WHY TITLE II IS DRAFTED THIS WAY AS COMPARED TO TITLES I AND III, GEORGIA'S ARGUMENT AND THE COURT IN DUDEK, I THINK, OVERLOOKED THE FACT THAT THEY ARE DRAFTED DIFFERENTLY BECAUSE THERE WAS A DRAFTING NEED TO NAME THE ATTORNEY GENERAL IN TITLES I AND III THAT THERE WASN'T IN

TITLE II.

TITLE I ADDRESSES DISABILITY DISCRIMINATION IN EMPLOYMENT. AND ITS ENFORCEMENT PROVISION INCORPORATES TITLE VII'S FRAMEWORK, WHICH INCLUDES DIFFERENT PROCEDURES FOR COMPLAINANTS FOR THE EEOC AND FOR THE ATTORNEY GENERAL.

AND THE SLIDE I'VE GOT THERE, IT'S HIGHLIGHTED ATTORNEY GENERAL IN PERSON, BUT THEY HAVEN'T HIGHLIGHTED COMMISSION, WHICH IS ALSO LISTED. BUT THESE THREE ACTORS ARE ALL NAMED IN TITLE I TO MAKE CLEAR THAT THERE ARE SPECIFIC PROVISIONS OF TITLE VII THAT RELATE TO THESE DIFFERENT ACTORS CARRY OVER TO TITLE I OF THE ADA.

TITLE III OF THE ADA ADDRESSES DISABILITY DISCRIMINATION IN PUBLIC ACCOMMODATIONS. AND ITS ENFORCEMENT SECTION INCORPORATES THE ENFORCEMENT PROVISION OF TITLE II OF THE CIVIL RIGHTS ACT WHICH ALSO ADDRESSES PUBLIC ACCOMMODATIONS. BUT THEN TITLE III GOES AHEAD AND AUTHORIZES BROADER RELIEF IN ACTIONS BROUGHT BY THE ATTORNEY GENERAL UNDER TITLE III.

AND YOU CAN'T SEE THAT IN THEIR QUOTE FROM TITLE III BECAUSE IT JUST STOPPED AT (B)(1)(B). BUT IF YOU CONTINUED READING THE REST OF (B), YOU WOULD SEE THAT, IN ACTIONS BROUGHT BY THE ATTORNEY GENERAL, DAMAGES ARE POTENTIALLY AVAILABLE AS WELL AS CIVIL PENALTIES. THAT IS UNTRUE IN TITLE II OF THE CIVIL RIGHTS ACT THAT'S BEING INCORPORATED. IT'S ALSO BROADER THAN THE REMEDIES PROVIDED TO PRIVATE PARTIES. SO, IF -- SO

CONGRESS HAD TO SPECIFY WHAT RIGHTS AND PROCEDURES GO WITH ATTORNEY GENERAL ACTIONS BECAUSE OF THOSE DIFFERENCES.

TITLE II IS DIFFERENT. IT INCORPORATES WITHOUT CHANGE THE DECADES-OLD EXISTING ENFORCEMENT SCHEME ESTABLISHED UNDER TITLE VI AND THE REHABILITATION ACT UNDER WHICH THE ATTORNEY GENERAL'S AUTHORITY TO FILE AN ACTION HAS ALREADY BEEN CLEAR. IT'S BEEN CLEAR FOR DECADES. AND CONGRESS USED LANGUAGE AS NEARLY IDENTICAL TO THE LANGUAGE THEY ARE USING IN THE REHABILITATION ACT WHEN IT WANTED TO ACCOMPLISH THE SAME THING WITH RESPECT TO THE RIGHTS, PROCEDURES, AND REMEDIES FROM TITLE VI.

WITH RESPECT TO THE REQUEST FOR A STAY, SO GEORGIA ASKS IN THE ALTERNATIVE THAT THIS COURT STAY THE CASE UNTIL THE 11TH CIRCUIT HAS RULED ON AN APPEAL IN DUDEK. SO THERE ARE A NUMBER OF PROBLEMS WITH THAT REQUEST.

AND, FIRST, THERE'S NO FINAL JUDGMENT IN DUDEK, SO WE DON'T KNOW WHEN THERE WILL BE A FINAL JUDGMENT IN THE CASE OR WHETHER THE CASE WILL GO TO TRIAL. AND SO YOU'RE FACING THE PROSPECT OF POSSIBLY AN INDEFINITE STAY. BUT EVEN IF AND WHEN THE DISTRICT COURT ISSUES A FINAL JUDGMENT IN DUDEK, THE PARTIES HAVE 60 DAYS TO APPEAL.

GEORGIA SEEMS TO ASSUME AS A FOREGONE CONCLUSION THAT THE UNITED STATES WILL APPEAL. BUT IT HAS TO GO THROUGH THE DEPARTMENT'S INTERNAL REVIEW PROCESS FOR DETERMINING WHETHER OR NOT TO TAKE AN APPEAL. AND SO YOU CAN'T ASSUME FOR CERTAIN

THAT THE UNITED STATES WILL APPEAL. AND SO THERE'S REALLY NO KNOWING HOW LONG THE APPELLATE PROCESS, IF ANY APPELLATE PROCESS, IS GOING TO LAST. SO WE ARE IN A SITUATION WE HAVE AN OPEN-ENDED AND INDEFINITE STAY OF PROCEEDINGS HERE.

I DON'T THINK IT'S AN ANSWER TO SAY, WELL, YOUR HONOR COULD SAY FOR A YEAR AND SEE WHERE WE ARE. THE WHOLE POINT OF THE STAY REQUEST IS TO STAY THIS CASE UNTIL THE 11TH CIRCUIT RULES IN DUDEK. AND WE REALLY HAVE NO IDEA IF AND WHEN THAT WILL EVER OCCUR.

AND, AT THE SAME TIME, THERE'S THIS EQUITABLE COMPONENT ABOUT THE ENORMOUS DAMAGE THAT WOULD BE INFLICTED ON STUDENTS IN THE MEANTIME. GEORGIA SAYS, WELL, THE STUDENTS AREN'T A PARTY TO THE CASE, THE UNITED STATES IS A PARTY TO THE CASE. BUT THE WHOLE PURPOSE OF -- I'VE SAID THIS BEFORE -- BUT THE PURPOSE THAT'S ARTICULATED IN THE STATUTE IS FOR THE FEDERAL GOVERNMENT TO HAVE A CENTRAL ROLE ENFORCING THE CHAPTER ON BEHALF OF INDIVIDUALS WITH DISABILITIES.

UNITED STATES IS THE CHAMPION OF THESE STUDENTS' RIGHTS HERE. THEY DON'T ALL HAVE THE WHEREWITHAL TO SUE ON THEIR OWN BEHALF. AND THEY ARE FACING SORT OF YEAR-END, YEAR-OUT, THEY WILL BEAR THE BRUNT OF THE STAY, OF ANY STAY IN THIS CASE. THESE STUDENTS ARE ENJOYING UNNECESSARY SEGREGATION AND UNEQUAL EDUCATIONAL OPPORTUNITIES. AND MY COLLEAGUE WILL ADDRESS THE FACTS FURTHER. BUT THE EQUITIES DO NOT FAVOR GEORGIA IN THIS CASE APART FROM THE FACT THEY ARE FACING AN

INDEFINITE AND OPEN-ENDED STAY IF THE GOAL IS TO WAIT FOR AN 11TH CIRCUIT RULING IN DUDEK.

SO, WITH RESPECT, YOUR HONOR, WE DON'T THINK A STAY WOULD BE APPROPRIATE HERE. AND FOR THE REASONS THAT I'VE GIVEN, UNITED STATES AND THE ATTORNEY GENERAL DO HAVE A CAUSE OF ACTION TO ENFORCE TITLE II.

AND IF THE COURT HAS NO FURTHER QUESTIONS, I WILL DEFER TO MY COLLEAGUE.

THE COURT: ALL RIGHT. THANK YOU, MA'AM.

MR. ENGLAND: GOOD MORNING, YOUR HONOR.

THE COURT: GOOD MORNING AGAIN, SIR.

MR. ENGLAND: MAY IT PLEASE THE COURT, MY NAME IS TRAVIS ENGLAND, AND I ALSO REPRESENT THE UNITED STATES OF AMERICA IN THIS MATTER. AS MY COLLEAGUE MENTIONED, I WILL BE ADDRESSING THE STATE'S REMAINING ARGUMENTS OTHER THAN THOSE ADDRESSING THE ATTORNEY GENERAL'S AUTHORITY TO BRING SUIT UNDER TITLE II AND THE STATE OF GEORGIA'S REQUEST FOR A STAY.

EACH OF THE STATE'S REMAINING ARGUMENTS IS PREMISED ON A FUNDAMENTAL MISUNDERSTANDING OF THE NATURE OF THE UNITED STATES' CLAIMS HERE OR THE FACTUAL ALLEGATIONS THAT HAVE BEEN RAISED IN THE COMPLAINT. AND BECAUSE OF THIS DISAGREEMENT BETWEEN THE PARTIES ABOUT THE NATURE OF THE UNITED STATES' CLAIM, I THINK IT WOULD BE HELPFUL FOR ME TO TAKE A STEP BACK AND GIVE A BRIEF OVERVIEW OF WHAT THE UNITED STATES IS ALLEGING HERE AND THE RELIEF THAT IT IS SEEKING.

ALTERNATIVELY, I'M HAPPY TO ANSWER ANY SPECIFIC QUESTIONS YOUR HONOR MIGHT HAVE ABOUT THE ARGUMENTS. BUT I THINK IT MIGHT BE HELPFUL TO HAVE AN OVERVIEW FIRST.

AS MY COLLEAGUE MENTIONED, TITLE II OF THE ADA PROHIBITS DISCRIMINATION BY PUBLIC ENTITIES IN THE ADMINISTRATION OF THEIR PROGRAMS, SERVICES, OR ACTIVITIES. THE UNITED STATES HAS BROUGHT THIS LAWSUIT ALLEGING THAT THE STATE HAS CHOSEN TO ADMINISTER A PROGRAM DELIVERING MENTAL HEALTH AND THERAPEUTIC EDUCATIONAL SERVICES AND SUPPORTS TO THOUSANDS OF STUDENTS WITH DISABILITIES AND BEHAVIOR-RELATED DISABILITIES, PRIMARILY IN THE SEGREGATED RATHER THAN INTEGRATED ENVIRONMENTS.

NOW, THIS PROGRAM, AS COUNSEL FOR THE STATE OF GEORGIA HAS EXPLAINED, IS KNOWN AS THE GEORGIA NETWORK FOR THERAPEUTIC AND EDUCATIONAL SUPPORTS. AND AS COUNSEL ACKNOWLEDGES, HAS ACKNOWLEDGED TODAY, THIS IS NOT A PLACE. THIS IS A PROGRAM OF THE STATE OF GEORGIA DELIVERING A SET OF SERVICES TO THOUSANDS OF STUDENTS WITH DISABILITIES THROUGHOUT THE STATE. AND THAT'S THE FOCUS OF THE UNITED STATES' COMPLAINT, HOW THE STATE IS ADMINISTERING THIS PROGRAM AND THE SET OF SERVICES.

AND THE UNITED STATES ALLEGES THAT THE MANNER IN WHICH THIS PROGRAM HAS BEEN ADMINISTERED IS CAUSING THOUSANDS OF STUDENTS WITH DISABILITIES TO BE SUBJECTED TO UNNECESSARY SEGREGATION. AND NOT ONLY DOES IT CAUSE STUDENTS IN THE

PROGRAM TO BE SEGREGATED FROM THEIR PEERS, IT DEPRIVES THE STUDENTS OF EQUAL EDUCATIONAL OPPORTUNITIES. STUDENTS IN THE PROGRAM ARE OFTEN DEPRIVED OF OPPORTUNITIES TO PARTICIPATE IN ELECTIVES, TO -- THEY ATTEND SCHOOLS WITHOUT PROPER GYMNASIUMS OR CAFETERIAS. AND THEY ARE UNABLE TO ENJOY THE BENEFITS OF AFTER-SCHOOL ACTIVITIES AND PROGRAMS, SUCH AS SPORTS AND OTHER CLUBS. NOW, THOSE ARE THE CENTRAL ALLEGATIONS OF THE UNITED STATES' COMPLAINT.

THE RELIEF THAT THE UNITED STATES SEEKS IS A REASONABLE MODIFICATION SYSTEMICALLY TO THE PROGRAM OF SERVICES THAT GEORGIA ADMINISTERS, IN THE FORM OF TAKING THE SPECIALIZED SERVICES THAT GEORGIA MAKES AVAILABLE IN THE GNETS PROGRAM, PRIMARILY IN SEGREGATED SETTINGS, AND INSTEAD DELIVERING MANY OF THOSE SAME SERVICES UP FRONT IN MORE INTEGRATED SETTINGS, THUS PREVENTING THE SEGREGATION IN THE FIRST PLACE.

THIS LAWSUIT IS NOT -- I REPEAT -- IS NOT ABOUT ANY PARTICULAR PLACEMENT OF ANY CHILD OR ANY SET OF CHILDREN. IT DOES NOT SEEK RELIEF IN THE FORM OF ANY PARTICULAR REVISIONS TO THE INDIVIDUAL EDUCATION PROGRAMS OF ANY PARTICULAR CHILD OR SET OF CHILDREN. RATHER, THIS LAWSUIT IS ABOUT THE STATE'S DISCRIMINATORY ADMINISTRATION OF THE PUBLIC FUNDING AND SERVICES FOR CHILDREN WITH BEHAVIORAL-RELATED DISABILITIES.

BECAUSE OF THE CHOICES THAT THE STATE OF GEORGIA AND ITS AGENCIES HAVE MADE WITH RESPECT TO ITS ALLOCATION OF RESOURCES WITH RESPECT TO THESE SERVICES, THOUSANDS HAVE BEEN

UNNECESSARILY SEGREGATED AWAY FROM THEIR PEERS. AND THAT IS DISCRIMINATION. AND THAT IS WHAT THIS LAWSUIT IS ABOUT.

THE UNITED STATES -- COUNSEL FOR THE STATE OF GEORGIA CLAIMS THAT ONLY A SMALL SUBSET OF THE STUDENTS WITHIN THE GNETS PROGRAM HAVE BEEN SUBJECTED TO SEGREGATION OR BEEN PLACED IN SELF-CONTAINED SETTINGS. BUT THAT SIMPLY IS JUST NOT THE CASE.

THE UNITED STATES' INVESTIGATION, WHICH IT UNDERTOOK SEVERAL YEARS AGO, FOUND THAT MORE THAN A SMALL SUBSET OF CHILDREN WERE IN SELF-CONTAINED ENVIRONMENTS. IN FACT, THOUSANDS WERE IN SELF-CONTAINED ENVIRONMENTS. AND THE UNITED STATES IS NOT AWARE OF ANY OTHER STATE THAT OPERATES A PROGRAM FOR STUDENTS WITH BEHAVIORAL-RELATED DISABILITIES IN THIS MANNER, THAT PRIMARILY RELIES ON THESE SEGREGATED SETTINGS, THESE SEPARATE SELF-CONTAINED SETTINGS TO DELIVER SERVICES TO THIS POPULATION.

AND SO, YOUR HONOR, THAT IS WHAT THE UNITED STATES SEEKS HERE, A MODIFICATION OF THAT SERVICE DELIVERY PARADIGM SUCH THAT SERVICES WILL BE DELIVERED UP FRONT TO ENABLE CHILDREN TO BE -- TO ENJOY EQUAL OPPORTUNITIES WITH AND TO BE INTEGRATED IN GENERAL EDUCATION ENVIRONMENTS WITH THEIR PEERS.

NOW, GEORGIA'S FIRST SPECIFIC ARGUMENT REGARDING THE SUFFICIENCY OF THE COMPLAINT'S ALLEGATIONS CENTERS ON ITS CONTENTION THAT THE COMPLAINT DOES NOT PLAUSIBLY ALLEGE THAT THE STATE OF GEORGIA ADMINISTERS THE GNETS PROGRAM AND THAT THE

UNITED STATES' CLAIMS WOULD THEREFORE BE DISMISSED. THIS ARGUMENT IS SIMPLY BASELESS.

THE GNETS PROGRAM IS A SERVICE PROGRAM OR ACTIVITY OF THE STATE OF GEORGIA. AND, THEREFORE, UNDER TITLE II, THE STATE OF GEORGIA MUST ADMINISTER IT IN A WAY THAT IT DOES NOT CAUSE DISCRIMINATION.

NOW, GEORGIA CLAIMS THAT ITS CONSTITUTION PLACES SOLE RESPONSIBILITY FOR EDUCATION WITH LOCAL BOARDS OF EDUCATION. BUT THIS ARGUMENT DISREGARDS THE CENTRAL ROLE THAT GEORGIA'S BOARD OF EDUCATION FEATURES IN THE CONSTITUTION AS WELL REGARDING THE, REGARDING THE MANNER IN WHICH EDUCATIONAL SERVICES ARE DELIVERED IN THE STATE.

AND IN DISREGARD TO SUBSTANTIAL REGULATORY AND MANAGERIAL ROLE THAT THE GEORGIA DEPARTMENT OF EDUCATION PLAYS IN DETERMINING THE MANNER IN WHICH THE GNETS PROGRAM WILL OPERATE STATEWIDE, THE COMPLAINT PLAINLY ALLEGES THE MYRIAD WAYS THAT THE STATE OF GEORGIA PLANS, FUNDS, MANAGES, AND OVERSEES THE GNETS PROGRAM STATEWIDE. AND I'LL GO THROUGH A NUMBER OF THOSE WAYS.

THESE TERMS ARE NOT MERE UNSUPPORTED LEGAL CONCLUSIONS, AS GEORGIA HAS ARGUED IN ITS PAPERS AND TODAY. THEY ARE FACTS. NOW, THE GEORGIA'S GENERAL ASSEMBLY FOR DECADES HAS DESIGNATED SPECIFIC FUNDING FOR THE GNETS PROGRAM. MILLIONS OF DOLLARS IN STATE AND FEDERAL FUNDS THAT ARE TO BE ADMINISTERED BY THE GEORGIA DEPARTMENT OF EDUCATION AND GRANTED

TO REGIONAL GNETS PROGRAMS THROUGHOUT THE STATE. THE GEORGIA DEPARTMENT OF EDUCATION DETERMINES HOW THESE FUNDS WILL BE SPENT AND WHAT SERVICES THEY WILL FUND AND WHERE THESE SERVICES WILL BE DELIVERED. IT APPROVES THE GRANTS THAT -- THE GRANT APPLICATIONS THAT ARE MADE BY THE REGIONAL PROGRAMS AND THEREFORE HAS CONTROL OVER WHAT IS APPROVED OR WHAT IS DISAPPROVED.

AND, AGAIN, THE GEORGIA DEPARTMENT OF EDUCATION HAS SET FORTH A REGULATION ESTABLISHING THE USE OF FEDERAL FUNDING UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT PART B, SPECIFICALLY FOR FUNDING SERVICES FOR CHILDREN DIAGNOSED WITH SERIOUS EMOTIONAL AND BEHAVIORAL DISORDERS AND THAT THE SPECIFIC STATUTE THAT I'M REFERRING TO IS GEORGIA COMPREHENSIVE RULES AND REGULATIONS 160-1-4-49. THESE REGULATIONS REQUIRE DOLLARS TO BE SPENT ON THE GNETS PROGRAM. THESE ARE SPECIFIC DOLLARS THAT HAVE BEEN GRANTED BY THE FEDERAL GOVERNMENT UNDER I.D.E.A. PART B. AND THESE REGULATIONS DIRECT THE GEORGIA DEPARTMENT OF EDUCATION TO SPEND THEM ON THE GNETS PROGRAM.

THE STATE IS THUS A GATEKEEPER OF THESE DOLLARS THAT ARE ULTIMATELY USED FOR DELIVERY OF SERVICES TO THE, TO THE STUDENTS IN THE GNETS PROGRAM.

IT MAY CHOOSE HOW TO ALLOCATE THEM AS IT SEES FIT WITHIN THE BOUNDARIES OF THE FEDERAL I.D.E.A. GRANT. AS IT STANDS, HOWEVER, IT CHOOSES TO SPEND THESE DOLLARS PRIMARILY IN A PROGRAM THAT DELIVERS SERVICES IN PRIMARILY SEGREGATED

SETTINGS.

NOW, THE GEORGIA DEPARTMENT OF EDUCATION HAS ALSO ISSUED REGULATIONS GOVERNING THE OPERATION OF THE GNETS PROGRAMS STATEWIDE. AND THESE WHICH, WHICH ARE LOCATED IN THE BINDER THAT COUNSEL FOR THE STATE HAS PROVIDED UNDER TAB D-2 ENDING IN 7-.15, THESE REGULATIONS ESTABLISH ELIGIBILITY REQUIREMENTS FOR THE PROGRAM STATEWIDE. THEY DELINEATE RESPONSIBILITIES FOR VARIOUS ACTORS THAT PARTICIPATE IN THE PROGRAM, INCLUDING REGIONAL EDUCATION SERVICE AGENCIES AS WELL AS LOCAL EDUCATIONAL AGENCIES. AND THE REGULATIONS ALSO GOVERN THE MANNER IN WHICH REGIONAL GNETS PROGRAMS ARE TO SET THEIR BUDGETS AND OTHER OPERATIONAL REQUIREMENTS SUCH AS CLASS SIZES.

THE GEORGIA ITSELF HAS ACKNOWLEDGED ITS CENTRAL ROLE THAT THE GEORGIA DEPARTMENT OF EDUCATION PLAYS IN THE ADMINISTRATION OF THE GNETS PROGRAM. AND I THINK THAT IF YOU LOOK AT PARAGRAPH 60 OF THE COMPLAINT, THE UNITED STATES REFERS TO A 2010 AUDIT BY THE GEORGIA DEPARTMENT OF AUDITS AND ACCOUNTING, WHICH WAS UNDERTAKEN OVER -- AN AUDIT THAT WAS UNDERTAKEN REGARDING THE GNETS PROGRAM AND ITS ADMINISTRATION.

NOW, THE RESULTS OF THE AUDIT, WHICH FOUND NO ASSURANCE THAT THE GNETS PROGRAM PROVED COST-EFFECTIVE IN DELIVERY OF SERVICES TO ITS STUDENTS, MADE SPECIFIC RECOMMENDATIONS. AND WHO ARE THOSE RECOMMENDATIONS MADE TO. THEY WERE MADE TO THE GEORGIA DEPARTMENT OF EDUCATION BECAUSE OF ITS CENTRAL ROLE IN THE ADMINISTRATION OF THE PROGRAM AND

ENSURING THAT THE PROGRAM MEETS THE GOALS AS SET FORTH BY THE LEGISLATURE.

NOW, BECAUSE OF THE AUDIT'S FINDINGS, THE GEORGIA DEPARTMENT OF EDUCATION FOR THE LAST SEVERAL YEARS HAS UNDERTAKEN A STRATEGIC PLANNING PROCESS WITH VARIOUS ACTORS WITHIN THE GNETS PROGRAM. IT EMPLOYS STAFF SPECIFICALLY CHARGED WITH OVERSEEING THE OPERATION OF THE PROGRAM STATEWIDE AND WORKING WITH VARIOUS ACTORS THROUGHOUT THE STATE. AND IT HAS PUBLISHED NUMEROUS UPDATES TO A STRATEGIC PLAN OVER THE LAST SEVERAL YEARS DICTATING THE COURSE AND THE TRAJECTORY OF WHERE THE PROGRAM WAS GOING.

IN ADDITION, AS COUNSEL ACKNOWLEDGED EARLIER TODAY, IT -- THE GEORGIA DEPARTMENT OF EDUCATION HAS UNDERTAKEN CLOSURES OF FACILITIES WHERE THOSE FACILITIES HAVE BEEN IDENTIFIED TO VIOLATE CERTAIN COMPLIANCE CRITERIA. AND COUNSEL ACKNOWLEDGED THAT IT WOULD NOT HESITATE TO TAKE FURTHER ACTION IF SUCH, IF SUCH NONCOMPLIANCE WAS FOUND IN THE FUTURE. AND THE COMPLAINT THAT SETS FORTH A NUMBER OF SCHOOL CLOSURES THAT OCCURRED PRIOR TO THE CURRENT SCHOOL YEAR.

SO STATE AGENCIES IN GEORGIA, INCLUDING THE GEORGIA DEPARTMENT OF EDUCATION, ARE CENTRALLY INVOLVED IN PLANNING, FUNDING, MANAGING, REGULATING, AND OVERSEEING THE STATEWIDE GNETS PROGRAM.

GEORGIA'S COUNTER-ARGUMENTS ARE UNAVAILING. GEORGIA PRINCIPALLY RELIES ON THE BACON CASE FROM THE FOURTH CIRCUIT.

AND I THINK THAT CASE IS MATERIALLY DISTINGUISHABLE. FIRST OF ALL, IT DIDN'T STAND FOR THE GENERAL PROPOSITION THAT FUNDING IS NOT A BASIS FOR LIABILITY. WHAT THAT CASE STOOD FOR WAS THAT THERE, THE -- A GROUP OF PLAINTIFFS SUED THE SCHOOL BOARD WITHIN THE CITY OF RICHMOND, WHICH IS A SEPARATE LEGAL ENTITY FROM THE CITY OF RICHMOND ITSELF. AND THE FOURTH CIRCUIT CONSIDERED WHAT -- THE LAW -- THE FOCUS OF THE LAWSUIT WAS WHETHER THE SCHOOL DISTRICT AND ITS FACILITIES WERE PHYSICALLY ACCESSIBLE TO STUDENTS WITH DISABILITIES.

PART OF THE RELIEF THAT WAS SOUGHT IN THE LAWSUIT SOUGHT TO INCLUDE THE STATE OF GEORGIA -- OR SOUGHT TO INCLUDE THE CITY OF RICHMOND TO PROVIDE FUNDING FOR CERTAIN PHYSICAL MODIFICATIONS THAT WERE NECESSARY TO EFFECTUATE THE RELIEF THAT WAS SOUGHT. AND THE FOURTH CIRCUIT CONSIDERED WHETHER IN -- WHETHER THE DISTRICT COURT WAS PROPERLY ABLE TO ISSUE AN ORDER REQUIRING THE CITY OF RICHMOND TO EFFECTUATE THE RELIEF.

AND THE FOURTH CIRCUIT HELD THAT THE DISTRICT COURT WAS NOT, BUT THAT WAS BECAUSE NO FINDING OF LIABILITY WAS ISSUED AS TO THE DISTRICT -- AS TO THE CITY OF RICHMOND. SO IT DID NOT STAND FOR THE PROPOSITION THAT THE SOLE -- A PUBLIC ENTITY'S SOLE CONNECTION TO A VIOLATION IS FUNDING THAT IT CANNOT BE FORCED TO COMPLY OR COMPELLED TO COMPLY WITH THE LAW VIA COURT ORDER.

BUT I THINK, IRRESPECTIVE OF WHAT THE, WHAT THE BACON COURT HELD, WHAT YOU HAVE HERE, AS I LAID OUT EARLIER, IS

SUBSTANTIALLY MORE THAN JUST FUNDING. THE STATE OF GEORGIA REGULATES, MANAGES, OVERSEES, AND FUNDS THE GNETS PROGRAM.

AND FOR THE SAME REASONS ADDRESSING THE ARGUMENT THAT YOUR HONOR ORDERS BRIEFING ON REGARDING WHETHER THE STATE OF GEORGIA IS THE PROPER DEFENDANT IN THIS ACTION, THE LOCUS OF CONTROL OF THE STATEWIDE POLICIES AND PROCEDURES OF THE GNETS PROGRAM AND THE MENTAL HEALTH AND THERAPEUTIC EDUCATIONAL SERVICES THAT ARE AT ISSUE IN THIS CASE, THE LOCUS OF CONTROL OF THESE ACTIVITIES IN THIS PROGRAM IS WITH THE STATE OF GEORGIA AND ITS, AND ITS STATE AGENCIES.

NOW, COUNSEL'S ARGUMENTS AND AUTHORITY SUGGESTING THE STATE IS NOT A PROPER DEFENDANT ARE, THEREFORE, INAPPOSITE. THE STATE OF GEORGIA IS A PUBLIC ENTITY UNDER TITLE II OF THE ADA. 42 U.S.C. 12131 DEFINES WHAT A PUBLIC ENTITY IS. AND GEORGIA HAS NOT CITED TO A SINGLE CASE WHERE THE STATE HAS NOT BEEN HELD -- WHERE A STATE HAS NOT BEEN FOUND A PROPER PARTY IN A CASE WHERE THE UNITED STATES HAS BROUGHT RELIEF -- BROUGHT A CASE FOR RELIEF UNDER THE ADA.

SO THE UNITED STATES SETS FORTH A REASONABLE -- UNITED STATES' COMPLAINT SETS FORTH THE REASONABLE MODIFICATIONS THAT ARE REQUIRED TO REMEDY THE SYSTEMIC DISCRIMINATION THAT IS DESCRIBED IN THE COMPLAINT CAUSED BY THE STATE'S ADMINISTRATION OF THE GNETS PROGRAM AND THE MENTAL HEALTH AND THERAPEUTIC EDUCATIONAL SERVICES DELIVERED BY THAT PROGRAM.

THE VIOLATIONS OF -- IDENTIFIED BY THE COMPLAINT ARE, THEREFORE, FAIRLY TRACEABLE TO THE STATE'S ACTIONS AND, THEREFORE, CAPABLE OF REDRESS BY THIS COURT.

THE STATE DOES CITE A HODGEPODGE OF CASES THAT INVOKE THE 11TH AMENDMENT OR THE 11TH AMENDMENT EX PARTE YOUNG EXCEPTION. BUT THERE'S CLEAR 11TH CIRCUIT AUTHORITY THAT THE 11TH AMENDMENT DOES NOT APPLY TO SUITS BROUGHT BY THE UNITED STATES AS TO SUIT BY -- DOES NOT APPLY TO SUITS BY THE UNITED STATES AGAINST A STATE ACTOR OR AGAINST THE STATE ITSELF.

AND SO THE VARIOUS CASES THAT THE STATE CITES INSTEAD FOCUSES ON WHERE THE RELIEF AGAINST A STATE ACTOR WILL NOT PROVIDE ANY RELIEF AT ALL FOR VARIOUS REASONS. AND I THINK HERE, WHERE THE UNITED STATES HAS ALLEGED THE CLEAR WAYS THAT THE STATE ADMINISTERS THIS PROGRAM AND THAT THE ADMINISTRATION OF THE PROGRAM RESULTS IN THOUSANDS OF STUDENTS INAPPROPRIATELY SEGREGATED, THE RELIEF THAT UNITED STATES SEEKS TO OBTAIN HERE IS APPROPRIATELY SOUGHT FROM THE STATE ITSELF.

THE INJURY THAT WE ALLEGE IS THEREFORE FAIRLY TRACEABLE TO THE CHALLENGED ACTION AND FAIRLY TO MAKE SERVICES IN INTEGRATED SETTINGS THROUGH THE GNETS PROGRAM, GEORGIA ITSELF CAN DO THAT.

GEORGIA'S NEXT ARGUMENT IS THAT THE UNITED STATES HAS FAILED TO ALLEGE NECESSARY ELEMENTS OF ITS CLAIM. IT ARGUES THAT THE COMPLAINT DOES NOT ALLEGE THAT STUDENTS WITH DISABILITIES HAVE BEEN ASSESSED BY STATE TREATMENT

PROFESSIONALS TO BE APPROPRIATE TO RECEIVE SERVICES IN MORE INTEGRATED SETTINGS AND THAT THESE STUDENTS AND THEIR FAMILIES DO NOT OPPOSE. AND IT CHARACTERIZES THESE AS NECESSARY ELEMENTS OF A CLAIM FOR VIOLATION OF THE INTEGRATION MANDATE.

BUT UNITED STATES' COMPLAINT PLAINLY ALLEGES THAT THE STUDENTS IN THE GNETS PROGRAM COULD BE SERVED IN MORE INTEGRATED SETTINGS AND THAT THE SERVICES CURRENTLY DELIVERED BY THE GNETS PROGRAM COULD BE DELIVERED IN MORE INTEGRATED SETTINGS. AND THEY COULD MEET THESE NEEDS. AND THAT REALLY GOES TO WHETHER STUDENTS WITH DISABILITIES ARE QUALIFIED INDIVIDUALS WITH DISABILITIES AND THEY ARE QUALIFIED FOR BOTH SERVICES IN THE GNETS PROGRAM AND SERVICES IN THE COMMUNITY.

AND THESE ALLEGATIONS ARE NOT MADE ON MERE INFORMATION OR BELIEF, AS COUNSEL STATES IN THEIR PAPERS, OR BASED ON NOTHING, AS COUNSEL STATED TODAY. THEY ARE BASED ON -- THEY ARE MADE AFTER A MULTI-YEAR INVESTIGATION THAT COUNSEL ACKNOWLEDGED EARLIER INVOLVING EXPERTS WITH SPECIALIZED KNOWLEDGE IN THE DELIVERY OF MENTAL HEALTH AND THERAPEUTIC EDUCATIONAL SERVICES.

AS SET FORTH IN THE UNITED STATES' COMPREHENSIVE LETTER OF FINDINGS, WHICH ISSUED A YEAR PRIOR TO THIS LAWSUIT, THE EXPERTS THAT THE UNITED STATES RETAINED FOUND THAT THE STUDENTS IN THE GNETS PROGRAM WITH BEHAVIORAL-RELATED DISABILITIES DID INDEED NEED CERTAIN SERVICES THAT WERE MADE AVAILABLE THROUGH THE GNETS PROGRAM, BUT THERE WAS NOTHING

UNIQUE ABOUT THOSE NEEDED SERVICES THAT REQUIRED THEIR PERMISSION IN SEGREGATED SETTINGS.

THUS, THE VAST MAJORITY OF THE STUDENTS IN THE PROGRAM, THESE EXPERTS FOUND, COULD BE SERVED IN MORE INTEGRATED SETTINGS.

AS TO THE STATE'S ARGUMENT RELATING TO WHETHER THE STATE'S TREATMENT PROFESSIONALS HAVE MADE SPECIFIC FINDINGS, AS COUNSEL ACKNOWLEDGED, THE DAY VERSUS DISTRICT OF COLUMBIA CASE FROM THE DISTRICT OF D.C. FROM 2012 ACKNOWLEDGED THAT A PERSON WITH A DISABILITY NEED NOT RELY SOLELY ON STATE TREATMENT PROFESSIONALS' DETERMINATIONS REGARDING WHETHER SOMEONE IS APPROPRIATE FOR COMMUNITY-BASED SETTINGS OR NOT. AND SO THERE IS NO REQUIREMENT IN THE LAW THAT THE STATE TREATMENT PROFESSIONAL HAVE FOUND SOMEONE SPECIFICALLY APPROPRIATE.

AND, IN THIS CASE, WE WOULD SUBMIT THAT THIS IS A MATTER THAT WOULD BE INAPPROPRIATE FOR DETERMINATION AT SUMMARY JUDGMENT AS A FULL FACTUAL RECORD WOULD ALLOW THE PARTIES TO ENGAGE IN APPROPRIATE DISCOVERY REGARDING THE APPROPRIATENESS AND REGARDING EXPERT OPINIONS RELATING TO THE POPULATION OF GNETS -- OF STUDENTS WITHIN THE GNETS PROGRAM AS TO WHETHER THEY ARE APPROPRIATE FOR SERVICES IN MORE INTEGRATED SETTINGS.

THE COURT: SO YOU'RE NOT MAKING A POINT THAT THE FINDINGS OF SOME PROFESSIONAL MAY NOT BE NECESSARY AT SOME POINT IN THIS CASE, BUT IT WOULD NOT BE APPROPRIATE AT THIS STAGE, A MOTION TO DISMISS?

MR. ENGLAND: THAT'S CORRECT, YOUR HONOR. WE -- YOU KNOW, IN A CASE OF THIS NATURE, IN OTHER CASES THAT HAVE IMPLICATED THE INTEGRATION MANDATE ON BEHALF OF -- OR WITH RESPECT TO A CLASS OF INDIVIDUALS, MANY CASES, MANY THOUSANDS OF INDIVIDUALS, THE PARTIES TYPICALLY RELY ON EXPERT DISCOVERY AND EXPERT REPORTS AND TESTIMONY TO ASSESS THAT APPROPRIATENESS FACTOR, THAT THERE MAY BE -- IT MAY NOT BE THAT THE PARTIES WILL ASSESS EACH AND EVERY INDIVIDUAL THROUGH THE COURSE OF THE LITIGATION. IT MAY BE THAT AN EXPERT WILL CONDUCT SAMPLES, A SAMPLING OF INDIVIDUALS AND REVIEW RECORDS AND INTERVIEW INDIVIDUALS FOR APPROPRIATENESS. BUT IN NEARLY EVERY OTHER CASE IMPLICATING THE INTEGRATION MANDATE, THAT IS HOW THAT HAS PLAYED OUT AND THAT A DECISION TO DISMISS IN THE ABSENCE OF A SPECIFIC, THE SPECIFIC PRESENCE OF THE STATE TREATMENT PROFESSIONALS' ASSESSMENT WOULD REALLY RENDER INDIVIDUALS WITH DISABILITIES AT -- RENDER THEM POWERLESS TO BRING THEIR OWN CLAIMS, WHEREAS STATE TREATMENT PROFESSIONALS, FOR EXAMPLE, HAVEN'T ENGAGED IN THAT ANALYSIS.

AND THAT, I THINK, IS A PART OF WHAT THE DAY V. DISTRICT OF COLUMBIA OPINION ACKNOWLEDGED.

SIMILARLY, THE UNITED STATES' INVESTIGATION FOUND THAT STUDENTS AND THEIR PARENTS WOULD NOT OPPOSE RECEIVING SERVICES IN MORE INTEGRATED SETTINGS. TAKING THE GNETS SERVICES AND PROGRAMS THAT ARE CURRENTLY MADE AVAILABLE PRIMARILY IN THE SEPARATE SELF-CONTAINED ENVIRONMENTS AND

PUTTING THEM IN GENERAL EDUCATION ENVIRONMENTS WHERE APPROPRIATE WOULD NOT BE OPPOSED BY THE POPULATION OF INDIVIDUALS THAT THE UNITED STATES INTERACTED WITH DURING ITS INVESTIGATION. AND THE COMPLAINT AT PARAGRAPH -- AT 46 SPECIFICALLY RESTATES THAT ALLEGATION. AND, AGAIN, WE WOULD SUBMIT THAT FURTHER DISCOVERY, EITHER EXPERT OR SIMPLE FACT DISCOVERY, WOULD ELUCIDATE THAT, THAT POINT.

AND SO, AT THE VERY LEAST, THE UNITED STATES' ALLEGATIONS SET FORTH A PLAUSIBLE CLAIM FOR RELIEF SUCH THAT DISMISSAL AT THIS JUNCTURE WOULD BE INAPPROPRIATE ABSENT FURTHER DEVELOPMENT OF THE FACTUAL RECORD. AND I THINK A HELPFUL CASE TO LOOK AT THE PLEADING REQUIREMENTS REGARDING AT THE MOTION TO DISMISS STAGE IN OLMSTEAD INTEGRATION AND CASE WOULD BE JOSEPH S. V. HOGAN, WHICH IS AN EASTERN DISTRICT OF NEW YORK CASE FROM 2008, WHICH THE UNITED STATES CITES IN ITS PAPERS.

GEORGIA'S NEXT ARGUMENT IS THAT THE I.D.E.A. GOVERNS THE OUTCOME OF STUDENTS' PLACEMENTS AND THAT THE ADA DOES NOT DELIVER RELIEF THAT IS INCONSISTENT WITH THE I.D.E.A. AND THIS, AGAIN, IS PREMISED ON A MISUNDERSTANDING AND MISSTATEMENT OF WHAT THE UNITED STATES SEEKS HERE. AGAIN, THE UNITED STATES ISN'T SEEKING ANY PARTICULAR, OVERTURNING ANY PARTICULAR RECOMMENDATION OF IEP TEAMS OR DETERMINATIONS OF IEP TEAMS REGARDING ANY INDIVIDUALS, STUDENTS, INDIVIDUALLY TAILORED SERVICES AS SET FORTH IN THE IEP. IT IS SEEKING MODIFICATION

OF THE MANNER IN WHICH THE STATE ADMINISTERS ITS STATEWIDE GNETS PROGRAM SUCH THAT STUDENTS AND THEIR IEP TEAMS ARE NOT INAPPROPRIATELY INCENTIVIZED -- ARE NOT INCENTIVIZED TO ACCESS SERVICES THROUGH THE GNETS PROGRAM IN LIEU OF MORE INTEGRATED GENERAL EDUCATION ENVIRONMENTS.

RIGHT NOW STUDENTS WHOSE IEP TEAMS HAVE IDENTIFIED THEM AS NEEDING THE SERVICES THAT ARE MADE AVAILABLE THROUGH THE GNETS PROGRAM, THEY PRIMARILY CAN ONLY GET THESE SERVICES IN THE SEGREGATED ENVIRONMENTS THAT THE GNETS PROGRAM CONTEMPLATES. AND SO, AS I HAVE MENTIONED, TAKING THAT PACKAGE OF SPECIALIZED SERVICES THAT GEORGIA HAS DEVELOPED WITHIN THE GNETS PROGRAM AND MAKING AVAILABLE MANY OF THOSE SERVICES BEFORE STUDENTS GET SENT OR SHUNTED TO SEGREGATED PLACEMENTS, THAT IS THE RELIEF WE'RE TALKING ABOUT.

LASTLY, GEORGIA MAKES THE ARGUMENT THAT THE UNITED STATES SEEKS HERE IS AN OBEY-THE-LAW INJUNCTION. AND I THINK AS I'VE EXPLAINED THROUGHOUT THIS ARGUMENT, UNITED STATES HAS DESCRIBED IN GREAT DETAIL IN ITS COMPLAINT AS WELL AS THE PRE-SUIT LETTER OF FINDINGS, THE REASONABLE MODIFICATIONS SYSTEMICALLY THAT IT BELIEVES WOULD BE NECESSARY TO ENSURE THE DISCRIMINATION AT ISSUE IN THIS CASE.

AND THE SPECIFIC SERVICES WHICH COUNSEL, COUNSEL STATES THAT THE COMPLAINT ASKS IN THE RELIEF PART THAT, THAT WE WOULD ASK FOR INTEGRATED MENTAL HEALTH AND BEHAVIORAL-RELATED SERVICES IN INTEGRATED SETTINGS, BUT THE COMPLAINT SPECIFICALLY

DESCRIBES THE TYPES OF SERVICES THAT ARE -- THAT WE ENVISION WOULD BE PROVIDED IN MORE INTEGRATED SETTINGS AT PARAGRAPHS 53 THROUGH 55. AND IT DETAILS THE SERVICES THAT COULD BE DELIVERED AND HOW THE STATE CAN EFFECTUATE THE DELIVERY OF THOSE SERVICES IN MORE INTEGRATED SETTINGS AND ALLOW EQUAL EDUCATIONAL OPPORTUNITIES FOR THIS POPULATION.

AND, YOUR HONOR, I'M HAPPY TO ANSWER ANY FURTHER QUESTIONS THAT YOU MAY HAVE.

BUT FOR ALL THESE REASONS, WE WOULD RESPECTFULLY SUBMIT THAT GEORGIA'S MOTION TO DISMISS SHOULD BE DENIED.

THE COURT: THANK YOU SO MUCH, SIR.

ALL RIGHT. GEORGIA, DO YOU NEED A SHORT BREAK BEFORE YOU FINISH YOUR ARGUMENT? OR ARE YOU READY TO GO?

MS. ROSS: READY TO GO, YOUR HONOR.

THE COURT: ALL RIGHT. YOU MAY PROCEED.

ARE YOU WAITING FOR ME? GO AHEAD. I WAS FLIPPING, SO MY APOLOGIES.

MR. BELINFANTE: NOT A PROBLEM AT ALL. THANK YOU, YOUR HONOR.

YOUR HONOR, THERE IS MUCH, CANDIDLY, THAT THE UNITED STATES AND THE STATE OF GEORGIA AGREE ON. THE STATE OF GEORGIA DOES NOT TAKE THE POSITION THAT CONGRESS INTENDED FOR THE UNITED STATES TO HAVE AN ACTIVE ROLE IN PROHIBITING DISCRIMINATION BASED ON DISABILITY. IN TITLES I AND III, THEY HAVE AN EXPRESS CAUSE OF ACTION, STATUTORY STANDING TO BRING A

CASE.

IN TITLE II, THEY HAVE AUTHORITY TO ISSUE REGULATIONS THAT PRIVATE PARTIES CAN TAKE ADVANTAGE OF WHEN SEEKING REDRESS FOR DISCRIMINATION BASED ON DISABILITIES. THERE'S NO ARGUMENT THAT THE FEDERAL GOVERNMENT DOESN'T HAVE A ROLE TO PLAY AT ALL.

THE SOLE QUESTION IS WHETHER THAT ROLE INCLUDES BRINGING A SUIT UNDER TITLE II WHEN ALL OF THE CASES THAT, THAT WE HAVE CITED HAVE SHOWN, WHEN YOU LOOK TO WHETHER THE UNITED STATES IS GOING TO BE A PARTY, CONGRESS MAKES IT CLEAR. AND IT'S TELLING THAT IN OPPOSING COUNSEL'S ARGUMENT, IT TOOK ABOUT SEVEN OR EIGHT MINUTES BEFORE THEY BEGAN EVEN TALKING ABOUT TITLE II OF THE ADA. AND THEY BEGAN WITH TITLE VI OF THE CIVIL RIGHTS ACT.

BUT THAT STILL IGNORES THE BASIC PREMISE THAT THE REMEDIES THEY ARE FOCUSING ON ARE THE WHAT BUT THAT THEY IGNORE THE WHO CAN BRING THOSE CASES.

NOW, WHAT THEY ULTIMATELY, IT SEEMED, RELIED ON IS TO SAY THAT THE REMEDIES AND PROCEDURES IN THE CIVIL RIGHTS ACT ALLOW FOR AN ADMINISTRATIVE PROCESS AND, THEREFORE, THE DEPARTMENT OF JUSTICE CAN COME IN THROUGH THAT ADMINISTRATIVE PROCESS.

YOUR HONOR, THIS IS NOT ONE OF THOSE CASES. THERE IS NOT A STUDENT IN THE GNETS PROGRAM OR THEIR FAMILY MEMBER OR ANYONE ELSE WHO HAS, AS A PERSON, COMMENCED AN ADMINISTRATIVE PROCESS UNDER TITLE II. THIS IS SOMETHING THE DEPARTMENT OF

JUSTICE HAS DONE COMPLETELY ON ITS OWN. AND, THUS, THERE IS NOT THAT -- THE ARGUMENT THAT THEY RELY ON IS SIMPLY NOT THE CASE HERE.

THE NEXT ONE THAT THEY FOCUS ON, THEY CONTINUE TO REPEAT THAT THE LEGISLATIVE HISTORY MAKES CLEAR THAT THE UNITED STATES HAS A STRONG ROLE. AGAIN, WE DON'T DISAGREE. IT'S JUST AN EXCEPTION AS IT RELATES TO BRINGING AN ACTION IN TITLE II. AND AS WE WENT THROUGH, OF THE FOUR COMMITTEES THAT ISSUED IN THE HOUSE REPORTS ON THE ISSUE, ONLY ONE, EDUCATION AND LABOR, TOOK THE POSITION THAT TITLE II APPLIES AND ALLOWS THE ATTORNEY GENERAL TO MOVE FORWARD.

AND IT SHOULD NOTE THAT THE SECTION DEALING WITH ENFORCEMENT DID NOT FOCUS ON SCHOOL SYSTEMS OR SCHOOL SEGREGATION, EVEN THOUGH IT WAS COMING OUT OF THE EDUCATION AND LABOR COMMITTEE, WHEREAS THE OTHER TWO MADE EXPRESSLY CLEAR THAT THEY INTENDED IT TO BE AN INDIVIDUAL.

UNITED STATES CONTINUES TO RELY ON CHEVRON DEFERENCE IN THE SHOTZ CASE FROM THE 11TH CIRCUIT. SHOTZ INVOLVED AN INDIVIDUAL PLAINTIFF. THE UNITED STATES WAS NOT THE PARTY TO THAT. AND SO THE QUESTION IN INTERPRETING THE REGULATIONS WERE WHETHER THEY WERE CHEVRON DEFERENCE APPLIED AS IT WAS TO THE PERSON.

BUT, INTERESTINGLY ENOUGH, SHOTZ DISTINGUISHES IN A FOOTNOTE, I BELIEVE IT'S ROUGHLY 28, IT'S IN THE SECTION DEALING WITH CHEVRON DEFERENCE, IT SEEKS AND IT COMPARES

CHEVRON ANALYSIS FROM ANDERSON -- AGAIN, IT'S THE SANDOVAL ANALYSIS -- AND WHETHER AN AGENCY CAN CREATE A RIGHT OF ACTION WHERE CONGRESS HAS NOT.

THE ARGUMENT ADVANCED BY THE STATE OF GEORGIA IS IN ANDERSON AGAINST SANDOVAL DECISION. AND OUR POSITION IS THAT THIS STATUTE, 42 U.S.C. 12133, DOES NOT CREATE A PRIVATE RIGHT OF ACTION FOR THE ATTORNEY GENERAL. AND THE ATTORNEY GENERAL -- AND THEY DON'T EVEN ARGUE TODAY THAT THEY CAN CREATE ONE OUT OF THIN AIR. THAT'S -- THE SUPREME COURT AND THE DUDEK COURT RECOGNIZE THAT IN ITS OPINION.

YOUR HONOR, I THINK THAT THE CASE CANDIDLY COLLAPSES AND REALLY COMES DOWN ON THE QUESTION OF TITLE II STATUTORY CONSTRUCTION UNDERSTANDING, HOWEVER YOU WANT TO CALL IT, IN THE UNITED STATES' CONCESSION THAT THEY ARE NOT A PERSON, BECAUSE THE STATUTE SAYS THAT THE REMEDIES ARE AVAILABLE TO A PERSON. AND IF THE SAVING GRACE TO THAT IS THE ADMINISTRATIVE PROCESS, THAT'S NOT WHAT IS AT ISSUE HERE.

MOVING ON TO MR. ENGLAND'S ARGUMENT. HE BEGAN WITH A STATEMENT THAT THE STATE OF GEORGIA IS, IS ADMINISTERING THE PLAN IN A WAY THAT LEADS TO UNNECESSARY SEGREGATION. AND THEN SHORTLY AFTER THAT, HE SAID THAT THIS CASE IS NOT ABOUT THE PLACEMENT OF ANY CHILD.

YOUR HONOR, YOU CANNOT RECONCILE THOSE TWO ARGUMENTS WITH OLMSTEAD ANALYSIS. BECAUSE IN ORDER FOR IT TO BE UNNECESSARY SEGREGATION, AS OLMSTEAD MAKES VERY CLEAR, IN ORDER

FOR IT TO BE DISCRIMINATION AT ALL, THE ISOLATION HAS TO BE UNJUSTIFIED. AND THE QUESTION OF WHETHER IT IS UNJUSTIFIED TURNS ON THE DECISION OF A STATE PROFESSIONAL.

YOU'LL NOTE THERE'S NO ARGUMENT, THERE'S NO RESPONSE TO THE FACT THAT, HERE, THE IEP TEAM IS THE ONLY PROFESSIONALS THAT HAVE CONDUCTED ANY ANALYSIS. AND THEY HAVE MADE AN AFFIRMATIVE CONCLUSION THAT GNETS SERVICES ARE APPROPRIATE FOR THE STUDENTS TO RECEIVE.

ON THE ADMINISTRATION ARGUMENT AND THAT THE STATE OF GEORGIA DOES NOT ADMINISTER IT, THE DEPARTMENT OF JUSTICE CONTINUES TO SAY, WELL, OF COURSE IT DOES, BUT, FOR ONE EXAMPLE THEY DON'T ADDRESS TO THE COURT, THE STATUTORY LIMITATIONS IMPOSED ON THE STATE BOARD OF EDUCATION. CODE SECTION 20-2-152, THE OFFICIAL CODE OF GEORGIA, SAYS THAT THE STATE CAN FUND. IT DOES NOT SAY OPERATE. IT DOES NOT SAY ADMINISTER. IT DOES NOT SAY ANY OF THOSE THINGS. AND, AGAIN, THEY ARE NOT PLEADING AS A MATTER OF FACT THAT THE STATE IS OPERATING OUTSIDE OF ITS JURISDICTION. THE STATE IS FUNDING, AND THAT'S IT.

THE DEPARTMENT OF JUSTICE ALSO IN ITS COMPLAINT AT PARAGRAPH 25 INCORPORATES THE GNETS MANUAL. AND THE GNETS MANUAL ON PAGE 14 SETS FORTH THE ROLE OF THE GEORGIA DEPARTMENT OF EDUCATION. AND IT'S, ONCE FUNDS ARE APPROVED BY THE GENERAL ASSEMBLY FOR OPERATIONS OF GNETS, THE STATE BOARD OF EDUCATION APPROVED THE ALLOCATION OF THE FUNDS BASED ON THE FORMULA FOR

EACH GNETS PROGRAM.

THE GEORGIA DEPARTMENT OF EDUCATION PROVIDES ANNUAL PROGRAM APPLICATIONS FOR FUNDING THAT ARE SUBMITTED TO THE DEPARTMENT BY THE FISCAL AGENTS, WHICH ARE NOT STATE ACTORS.

AND THEN IT GOES ON FURTHER TO DISCUSS FUNDING VERSUS THE IMPLEMENTATION THAT OCCURS AT THE LOCAL EDUCATION LEVEL. IT'S NOT ENOUGH TO SAY IN A COMPLAINT THAT THE STATE ADMINISTERS SOMETHING WHEN THE LAW SIMPLY INDICATES OTHERWISE. THAT WOULD BE A LEGAL CONCLUSION THAT IS NOT SUPPORTED.

ON THE ISSUE OF WHETHER THERE WAS A PROPER PARTY INVOLVED, WE ARE NOT ARGUING AS THE STATE THAT THE 11TH AMENDMENT PROHIBITS THIS CASE. THE UNITED STATES IS THE PLAINTIFF. WE UNDERSTAND THAT. OUR POINT IN DISCUSSING THOSE OTHER CASES, THOUGH, IS THAT THE ANALYSIS TYPICALLY FOLLOWS ON WHO ADMINISTERS THE PROGRAM. AND THE STATE OF GEORGIA, WHETHER YOU LOOK AT IT FROM THE PERSPECTIVE OF ADMINISTER OR WHETHER YOU LOOK AT IT FROM THE STANDARD OF WHAT KIND OF RELIEF WOULD BE ISSUED AGAINST THE STATE OF GEORGIA, IT IS NOT THE ADMINISTRATOR OF THE GNETS PROGRAM.

FINALLY, FOR MY SECTION BEFORE MS. ROSS COMES, THE UNITED STATES TRIES TO AVOID THE FACT THAT IT FAILED TO PLEAD ANYTHING ABOUT ANY STUDENT BEING ASSESSED. THERE'S NO ALLEGATION OF THAT WHATSOEVER. DAY HAD IT, ALL THE CASES THEY HAD CITED. OLMSTEAD HAD IT. AND THIS IS SOMETHING THAT CAN BE DECIDED ON A MOTION TO DISMISS, BECAUSE THE OLMSTEAD DECISION

SETS FORTH, WHAT IS THE PRIMA FACIE ELEMENT. IT WOULD BE THE SAME AS ALLEGING A NEGLIGENCE CASE AND NOT ARGUING THAT THERE'S A DUTY. IT'S JUST SIMPLY ONE OF THOSE THINGS THAT PROVIDES A BASIS TO DISMISS FOR FAILURE TO STATE A CLAIM.

THEY THEN SAY, I THINK IN RESPONSE TO YOUR HONOR'S QUESTION, THAT THEY DON'T NEED TO ALLEGE THERE'S BEEN A FINDING NOW. THAT'S SIMPLY NOT THE CASE UNDER OLMSTEAD ITSELF, WHERE IT SAYS THAT -- AND THIS IS ON PAGE 607 OF THE COMPLAINT, UNDER TITLE II OF THE ADA, STATES ARE REQUIRED TO PROVIDE COMMUNITY-BASED TREATMENT FOR PERSONS WITH MENTAL DISABILITIES WHEN, ONE, THE STATE'S TREATMENT PROFESSIONALS DETERMINE THAT SUCH PLACEMENT IS APPROPRIATE.

THERE IS NOTHING IN THE COMPLAINT TO SHOW THAT. AND IN SOME WAYS, YOUR HONOR, IT'S NOT THAT DISSIMILAR FROM A STATE MEDICAL MALPRACTICE CASE WHERE THERE HAS TO BE AN ALLEGATION THAT THERE HAS BEEN A BREACH OF THE STANDARD OF CARE. AND, AT LEAST IN GEORGIA, THAT HAS TO BE DONE BY AN AFFIDAVIT OF A, OF A PHYSICIAN. WE'RE NOT SAYING THEY NEEDED AN AFFIDAVIT IN THIS CASE. THEY AT LEAST, THOUGH, NEEDED TO MAKE THE BARE ALLEGATION THAT SOME TREATMENT PROFESSIONAL -- NOW, THE GEORGIA TAKES THE POSITION IT HAS TO BE A STATE TREATMENT PROFESSIONAL, BECAUSE THAT'S WHAT OLMSTEAD SAYS. BUT THE COURT DOESN'T NEED TO DECIDE THAT ISSUE TODAY BECAUSE THERE'S NO ALLEGATION ABOUT A TREATMENT PROFESSIONAL AT ALL.

AND JUST TO DRIVE THAT POINT HOME, YOUR HONOR, THE

UNITED STATES CITES JOSEPH S. VERSUS HOGAN AS ITS AUTHORITY ON HOW TO LOOK AT A CASE ON A MOTION TO DISMISS GROUND. IT'S A DECISION IN THE EASTERN DISTRICT OF NEW YORK IN 2008. JOSEPH H., AS WE POINTED OUT, INVOLVED ALLEGATIONS OF A, A TREATMENT PROFESSIONAL SAYING THAT, IN THAT CASE, THE PLAINTIFF WAS, WAS APPROPRIATE FOR COMMUNITY SERVICES. AND JOSEPH H. -- OR JOSEPH S. SAYS ON PAGE 290 OF THE COMPLAINT ITSELF THAT PLAINTIFFS HERE MAY PREVAIL IF THE COMPLAINT ALLEGES WITH SUFFICIENT FACTUAL DETAIL TO RENDER THEIR CLAIMS PLAUSIBLE THAT INDIVIDUALS ARE PLACED IN NURSING HOMES, EVEN THOUGH, ONE, A DETERMINATION HAS BEEN MADE THAT A PARTICULAR INDIVIDUAL'S NEEDS MAY BE MET IN A MORE INTEGRATED SETTING. THAT ALLEGATION IS NOT IN THE COMPLAINT.

JOSEPH S. GOES ON ON PAGE 292 TO SAY THAT THE ALLEGATIONS CITED ABOVE ARE SUFFICIENT TO SUGGEST THERE HAS BEEN A PROFESSIONAL DETERMINATION THAT THE CLINICAL NEEDS OF THESE INDIVIDUALS MAY BE MET IN AN INTEGRATED COMMUNITY-BASED SETTING. IN FACT, THE COMPLAINT SPECIFICALLY ALLEGES THAT A MENTAL HEALTH PROFESSIONAL EVALUATED JOSEPH S. AND DETERMINED THAT HIS NEEDS COULD BE MET IN A MORE INTEGRATED SETTING.

YOU WILL NOT FIND A SIMILAR ALLEGATION IN THIS COMPLAINT. THEY DON'T CITE ONE TO YOU. AND THAT IS A BASIS TO DISMISS UNDER THE OLMSTEAD CASE ITSELF.

UNLESS YOUR HONOR HAS ANY OTHER QUESTIONS, I WILL RESERVE THE REST OF THE TIME FOR MS. ROSS.

THE COURT: I DO NOT. SHE'S GOT ABOUT TWO MINUTES AND 50 SECONDS.

MR. BELINFANTE: THANK YOU, JUDGE.

THE COURT: THANK YOU.

MS. ROSS: THIS IS WHEN I RETURN TO MY ROOTS OF GROWING UP IN BROOKLYN AND I START TALKING REALLY REALLY FAST.

THE COURT: ALL RIGHT. I'M SURE MADAM COURT REPORTER WILL APPRECIATE YOU FOR THAT.

MS. ROSS: YOUR HONOR, I'D LIKE TO CALL YOUR ATTENTION TO THE INTEGRATION MANDATE REGULATION THAT WAS PUT UP ON WHICH THE UNITED STATES RELIES, BECAUSE IT'S KNOWN TO REALLY FORM THE CENTER OF MY REBUTTAL. A PUBLIC ENTITY SHALL ADMINISTER SERVICES, PROGRAMS, AND ACTIVITIES IN THE MOST INTEGRATED SETTING APPROPRIATE TO THE NEEDS OF QUALIFIED INDIVIDUALS WITH DISABILITIES.

YOUR HONOR, WE ARE TALKING HERE ABOUT CHILDREN AGES THREE THROUGH 21 WHO, UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT, ARE IN AN APPROPRIATE SETTING ONLY IF TREATMENT PROFESSIONALS HAVE MADE THAT DETERMINATION AS TO THAT INDIVIDUAL STUDENT. SO THE UNITED STATES' SUGGESTION THAT, IN OTHER CASES, WHICH ARE NONEDUCATION CASES THAT HAVE BEEN BROUGHT UNDER TITLE II, THERE MAY BE A GENERAL STATEMENT OR GENERAL ALLEGATION IN THE COMPLAINT THAT TREATMENT PROFESSIONALS, AS A GENERAL RULE, BELIEVE THAT A COMMUNITY-BASED SETTING WILL WORK, AND THEN WE COULD GO INTO

DISCOVERY AND DETERMINE WHETHER IT WOULD WORK HERE ABSOLUTELY DEFIES I.D.E.A. IT MUST BE, BEFORE A STUDENT IS PLACED, AN INDIVIDUAL DETERMINATION. AND TIME IS IMPORTANT AS WELL, YOUR HONOR.

UNDER I.D.E.A., FROM THE -- IF THERE IS A COMPLAINT ABOUT A PLACEMENT OR ABOUT THE SETTING IN WHICH THE PLACEMENT IS DELIVERED, THERE'S A 45-DAY TIME FRAME FROM THE COMPLAINT, THE DUE PROCESS HEARING REQUEST, AND THE RESOLUTION. DISCOVERY IN FEDERAL COURT IS MONTHS AND MONTHS AND MONTHS. IT'S ABSOLUTELY INAPPLICABLE HERE.

NOW, THE UNITED STATES ARGUED THAT INDIVIDUALS IN GNETS SELF-CONTAINED SETTINGS MIGHT NOT HAVE THE ABILITY TO BRING CLAIMS. YES, THEY DO. FIRST OF ALL, IF ANY INDIVIDUAL STUDENT OR HIS OR HER PARENTS BELIEVES THAT THE GNETS PROGRAM IS BEING DELIVERED IN TOO RESTRICTIVE A SETTING, THEY CAN BRING A CLAIM WITH A 45-DAY WINDOW. AND THE DEPARTMENT OF EDUCATION CAN BRING A CLAIM AGAINST THE STATE OF GEORGIA UNDER I.D.E.A. IF IT WANTED TO. THERE IS ALSO CLASS ACTION PROVISION UNDER I.D.E.A.

IT'S SIMPLY NOT TRUE THAT I.D.E.A. COULD NOT REMEDY ANY INDIVIDUAL PROBLEM OR A PROBLEM IF A GROUP THOUGHT THAT PROBLEM EXISTED.

ALSO, THE UNITED STATES CLAIMS THAT IT IS NOT SEEKING TO OVERTURN THE DECISION OF ANY IEP TEAM. THAT'S COMPLETELY NOT TRUE, BECAUSE, REMEMBER, I SAID EARLY ON IN MY INITIAL

PRESENTATION, THE IEP TEAM MAKES TWO DETERMINATIONS: ONE, WHAT SERVICES DOES THIS INDIVIDUAL CHILD NEED. TWO, WHERE SHOULD THOSE SERVICES BE DELIVERED. THAT'S PART OF THE IEP.

NOW, IF YOU TAKE A LOOK IN THE NOTEBOOK THAT I PROVIDED UNDER TAB FIVE, UNDER TAB -- EXCUSE ME, C-5, EACH PUBLIC AGENCY MUST ENSURE THAT, TO THE MAXIMUM EXTENT APPROPRIATE, EACH CHILD WITH A DISABILITY IS EDUCATED WITH CHILDREN WHO ARE NON-DISABLED AND THAT SPECIAL CLASSES, ET CETERA, OR ANY REMOVAL OF CHILDREN WITH DISABILITIES FROM REGULAR EDUCATIONAL ENVIRONMENT OCCURS ONLY IF THE NATURE AND THE SEVERITY OF THE DISABILITY IS SUCH THAT EDUCATION IN REGULAR CLASSES WITH THE USE OF SUPPLEMENTARY AIDS AND SERVICES CANNOT BE ACHIEVED SATISFACTORILY.

NOW, WE KNOW THAT THE SCHOOL DISTRICT IS RESPONSIBLE UNDER THE FEDERAL REGULATIONS FOR PUTTING TOGETHER THE IEP TEAM THAT MAKES THAT DETERMINATION. BUT LOOK, PLEASE, UNDER TAB D-1. AND THIS IS PERHAPS THE MOST ESSENTIAL POINT. THE STATE OF GEORGIA REQUIRES EACH SCHOOL DISTRICT TO USE SPECIAL CLASSES, SEPARATE SCHOOLING, OR OTHER REMOVAL OF CHILDREN WITH DISABILITIES FROM THE REGULAR CLASS ENVIRONMENT ONLY, AS THE FEDERAL REG SAYS, WHEN THE NATURE OF THE SEVERITY OF THE DISABILITY IS SUCH THAT THEY CANNOT BE EDUCATED IN REGULAR CLASSES.

SO WHAT DOES THE GNETS PROGRAM PROVIDE? THE UNITED STATES IS SIMPLY WRONG IN SAYING THAT THE STATE PLACES THE

STUDENTS IN GNETS, THAT IT MAKES THESE SERVICES AVAILABLE ONLY IN SELF-CONTAINED SETTINGS. NO. BECAUSE IF WE LOOK BACK AT THE GNETS RULE, IT DOESN'T STATE THAT THE -- ANY STUDENT MUST GO INTO GNETS. IT RESTRICTS WHICH STUDENTS CAN GO INTO GNETS. SO THE GNETS RULE, WHICH IS --

THE COURT: YOU'RE OUT OF TIME, COUNSELOR, SO WRAP UP THIS POINT.

MS. ROSS: YOUR HONOR, THE PURPOSE OF GNETS IS TO PREVENT STUDENTS FROM HAVING TO GO INTO MORE RESTRICTED RESIDENTIAL PLACEMENT. THE FACT THAT THE GNETS PROGRAMS EXIST, EVEN THOSE THAT ARE DELIVERED IN SELF-CONTAINED SETTINGS, IS SOMETHING EXTRA THAT GEORGIA DOES TO PREVENT RESIDENTIAL PLACEMENT. IT IS NOT A MANDATORY PLACEMENT, NOR IS IT A MANDATORY SETTING FOR ANY SPECIAL EDUCATION STUDENT.

THANK YOU.

THE COURT: THANK YOU, MA'AM.

ALL RIGHT. THAT IS THE END OF OUR ORAL ARGUMENTS.

THE COURT WILL TAKE THIS UNDER ADVISEMENT. I DO WANT TO POINT OUT TO BOTH SIDES THAT THE COURT WAS EXTREMELY IMPRESSED AND PLEASED WITH THE BRIEFING IN THIS CASE. BOTH SIDES WERE EXCEPTIONAL.

ARE THERE ANY OTHER MATTERS TO BE HANDLED RIGHT NOW BEFORE WE ADJOURN FOR TODAY, ON BEHALF OF THE UNITED STATES?

MS. HUGHES: NO, YOUR HONOR.

THE COURT: ON BEHALF OF THE STATE OF GEORGIA.

MS. ROSS: NO, YOUR HONOR. THANK YOU.

THE COURT: ALL RIGHT. THANK YOU SO MUCH. WE'RE ADJOURNED.

THE COURTROOM SECURITY OFFICER: ALL RISE. COURT STANDS IN RECESS UNTIL FURTHER ORDERED.

(PROCEEDINGS CONCLUDED AT 12:31 P.M.)

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

CERTIFICATE OF REPORTER

I DO HEREBY CERTIFY THAT THE FOREGOING PAGES ARE A TRUE AND CORRECT TRANSCRIPT OF THE PROCEEDINGS TAKEN DOWN BY ME IN THE CASE AFORESAID.

THIS, THE 15TH DAY OF MAY, 2017.

/S/ ELIZABETH G. COHN

ELIZABETH G. COHN, RMR, CRR
OFFICIAL COURT REPORTER